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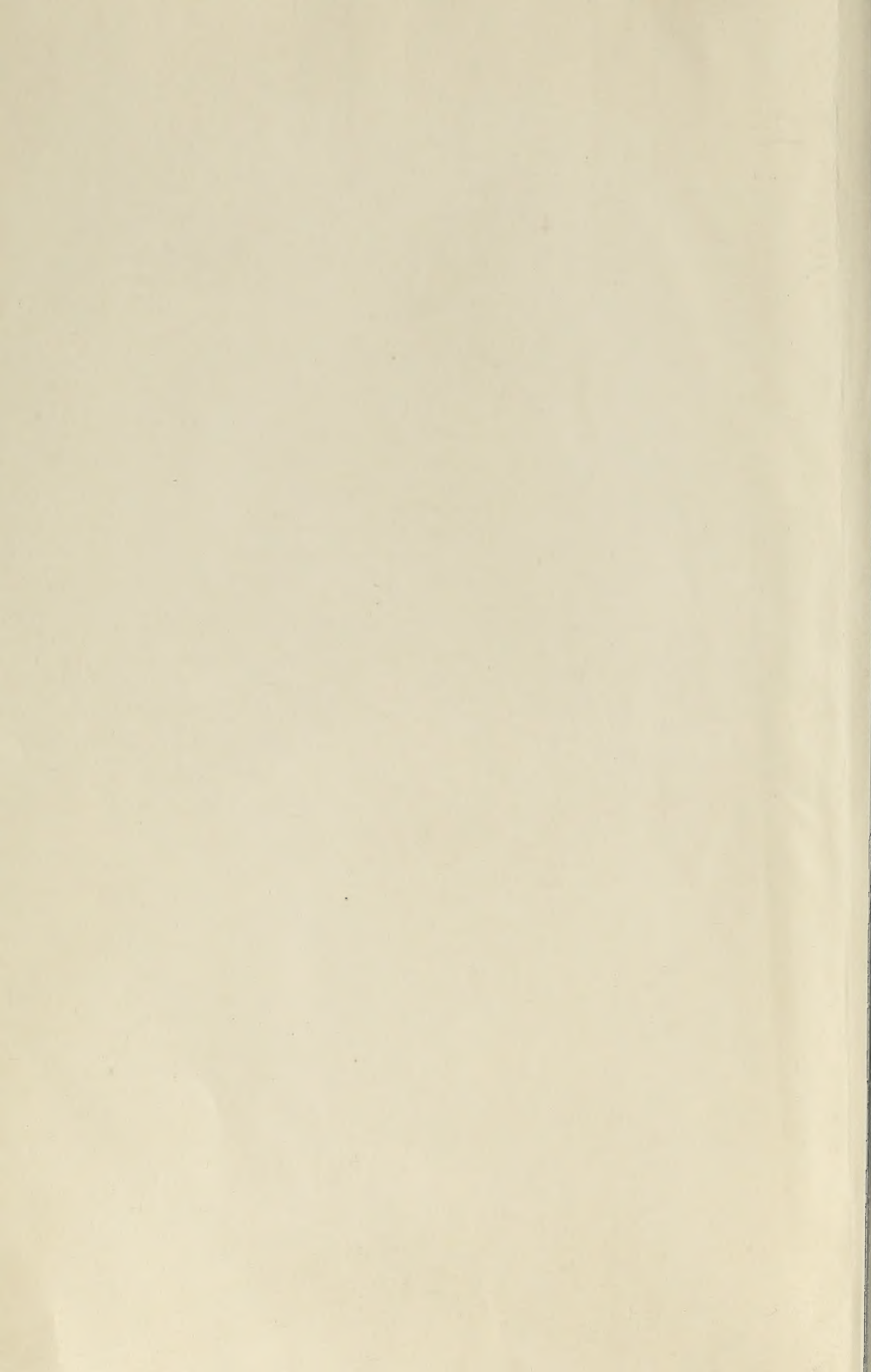
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United States  
1 1118  
**Circuit Court of Appeals**  
For the Ninth Circuit.

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HELEN K. KINNEY,

Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Cor-  
poration,

Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the Supreme Court of the  
Territory of Hawaii.

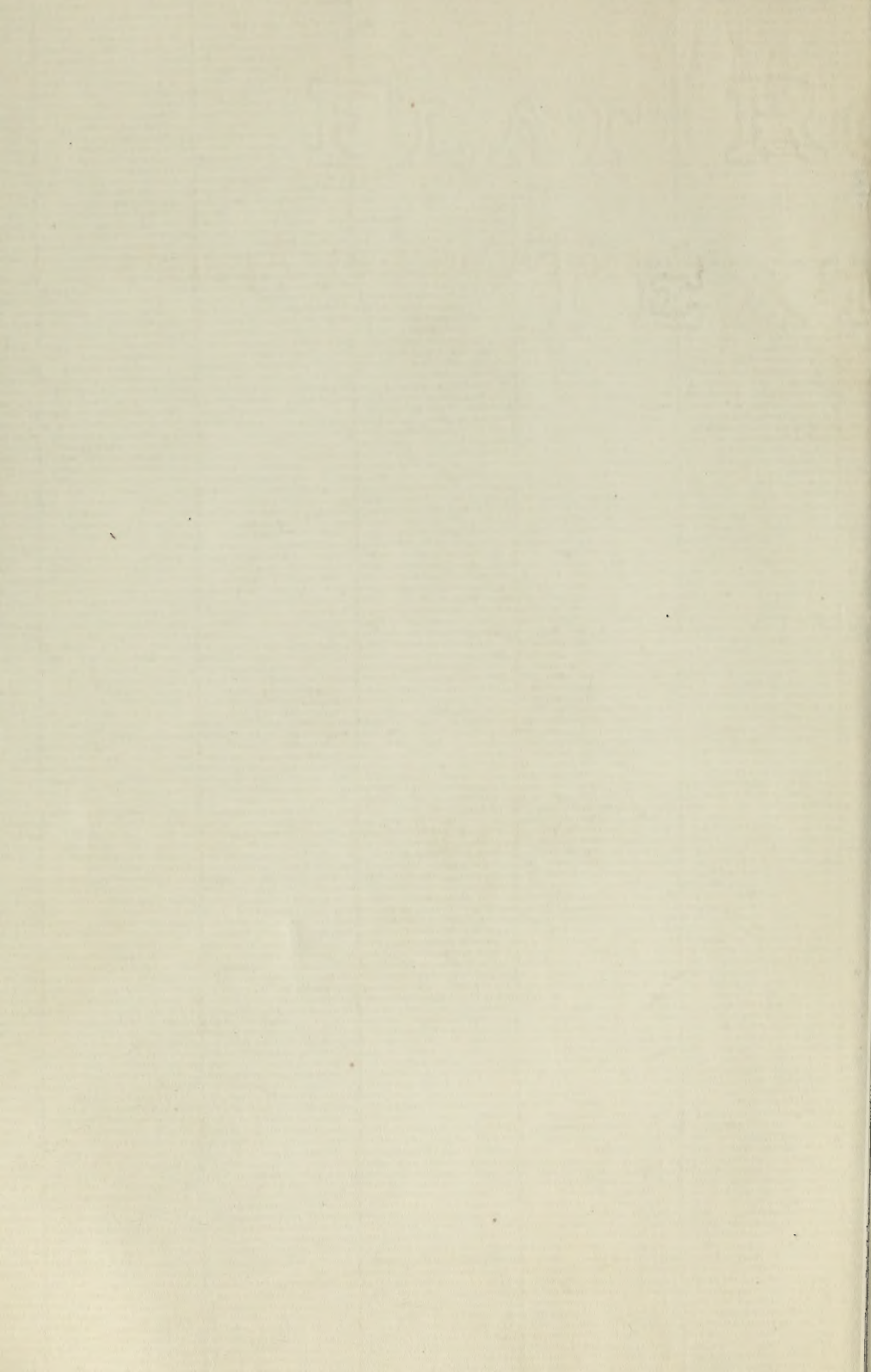
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**Filed**

SEP 24 1917

**F. D. Monckton,**  
Clerk.







United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer.....	16
Assignment of Errors.....	4
Assignment of Errors.....	61
Bond on Writ of Error.....	2
Bond on Writ of Error.....	70
Certificate of Clerk to Transcript of Record and Return to Writ of Error.....	101
Citation on Writ of Error.....	69
Citation on Writ of Error.....	74
Complaint.....	11
Decision.....	18

## EXHIBITS:

Exhibit "A"—Will of Bernice Pauahi Bishop, Dated October 31, 1883.....	78
Exhibit "B"—First Codicil to the Will of Bernice Pauahi Bishop, Dated October 4, 1884.....	85
Exhibit "C"—Second Codicil to the Will of Bernice Pauahi Bishop, Dated October 9, 1884....	90
Exhibit "D"—Mortgage, Dated December 15, 1890, Kahakuakoi et al. to Charles R. Bishop et al.....	92

Index.	Page
EXHIBITS—Continued:	
Exhibit “E”—Deed Dated October 22, 1894, Kahakuakoi et al. to M. P. Robinson...	96
Exhibit “F”—Deed Dated February 12, 1897, Mark P. Robinson to Oahu Sugar Company.....	97
Joinder in Error.....	39
Judgment.....	37
Judgment.....	58
Opinion.....	18
Opinion.....	41
Petition for Writ of Error.....	1
Petition for Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the Territory of Hawaii.....	59
Stipulation of Facts Admitted on Writ of Error	75
Summons.....	7
Term Summons.....	14
Writ of Error.....	9
Writ of Error.....	67
Writ of Error.....	72



*In the Supreme Court of the Territory of Hawaii.*

(Stamped \$2.00.)

HELEN K. KINNEY,

Plaintiff and Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant and Defendant in Error.

**Petition for Writ of Error.**

The plaintiff and plaintiff in error in the above-entitled cause, feeling herself aggrieved by the decision and judgment entered therein on the 14th day of February, 1917, by the Circuit Court of the First Circuit, Territory of Hawaii, comes now by Castle & Withington and W. C. Achi, her attorneys, and petitions this court for an order allowing said plaintiff and plaintiff in error to prosecute a writ of error to the said Circuit Court out of this court; and also that an order be made fixing the amount of security which the plaintiff and plaintiff in error shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in said court shall be suspended and stayed until the determination of the said writ of error by this Court.

And your petitioner will ever pray.

(S.) CASTLE & WITHINGTON,

(S.) W. C. ACHI,

Attorneys for Plaintiff and Plaintiff in Error. [1\*]

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

*In the Supreme Court of the Territory of Hawaii.*

(Stamped \$1.00.)

HELEN K. KINNEY,

Plaintiff and Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant and Defendant in Error.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, Helen K. Kinney, plaintiff and plaintiff in error in the above-entitled action, of Honolulu, in the City and County of Honolulu, Territory of Hawaii, as principal, and S. M. Kanakanui and Henry G. Winkley, both of said Honolulu, as sureties, are held and firmly bound unto the above-named Oahu Sugar Company, Limited, defendant and defendant in error, in the sum of Five Hundred Dollars (\$500) to be paid to the said Oahu Sugar Company, Limited, defendant and defendant in error, its successors and assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 19th day of February, 1917.

WHEREAS, the above-named plaintiff and plaintiff in error has prosecuted a writ of error to the Supreme Court of the Territory of Hawaii to reverse the judgment rendered in the above-entitled



[2] action by the said Circuit Court of the First Circuit, Territory of Hawaii, on the 14th day of February, 1917;

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff and plaintiff in error shall pay the judgment so rendered in said Circuit Court of the First Circuit in case it shall fail to sustain its writ of error, then this obligation shall be void; otherwise to remain in full force and effect.

Honolulu, February 19th, 1917.

(S.) MRS. HELEN K. KINNEY.

(S.) S. M. KANAKANU.

(S.) HENRY G. WINKLEY.

In the above-entitled matter, the amount of the bond is fixed at Five Hundred Dollars, and the foregoing bond is approved.

(Sig.) A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii. [3]

---

*In the Supreme Court of the Territory of Hawaii.*

IN ERROR TO THE CIRCUIT COURT OF THE  
FIRST CIRCUIT, TERRITORY OF HA-  
WAIL.

HELEN K. KINNEY,

Plaintiff and Plaintiff in Error,

vs.

ŌAHU SUGAR COMPANY, LIMITED, a Corpo-  
ration,

Defendant and Defendant in Error.

**Assignment of Errors.**

Now comes the plaintiff and plaintiff in error, and, for assignment of errors, alleges that the Circuit Court of the First Circuit, Territory of Hawaii, committed error in its judgment as follows, to wit:

**I.**

That the said Court erred in its decision and judgment in finding and deciding that the defendant is entitled to judgment, since the decision of the Court shows that the plaintiff is entitled to a judgment that she is the owner and entitled to the possession of and the mesne profits of one-third of the premises described in the complaint.

**II.**

That the said Court erred in failing to find, decide and adjudge on the facts found by it that the plaintiff is entitled to the possession of one-third of the premises described in the complaint and to the mesne profits of the same since June 8, 1914. [4]

**III.**

That the said Court erred in holding that the intention of the testatrix, Bernice Pauahi Bishop, was that Kahakuakoi and Kealohapauole should take an estate of inheritance by the entirety, which, if not conveyed by the joint act of the couple during life, should descend to the children of the couple, and/or the children of either of the couple, in case either had children by another, in direct and lineal descent forever; and, in case of a default in such lineal descendants, then to the trustees; in that an estate by the entirety which passes to the children of the deceased spouse, not children of the surviving spouse, would



not be an estate of inheritance by the entirety, and, second, that it is an erroneous construction of the will to hold that in case such an estate, at the decease of the survivor, was to pass to persons not the heirs or the heirs of the body of the survivor, such estate would pass by descent, and, likewise, it is erroneous to hold that there is anything in the will showing an intention that there was a condition that the estate should pass only in case it was not conveyed by the joint act of the couple during life.

#### IV.

That the Court erred in holding that the testatrix meant to give to Kahakuakoi and Kealohapauole something more than a life estate, and that she meant to give them an estate of inheritance and that she intended to create an estate in fee tail, particularly in that it is shown by the will and found by the Court that the testatrix intended that the estate, at the death of the survivor of the tenant by the entirety, should pass in certain contingencies to persons not the heirs or heirs of the body of said survivor. [5]

#### V.

That the said Court erred in holding that in case the testatrix intended to create an estate in fee tail, which is not enforceable under the law of Hawaii, that the Court should declare that the devise created a fee simple, in that it appearing from the decision of the Court and from the will that interests were given to others than the heirs or heirs of the body of the surviving tenant by the entirety, the devise should be held to create a life estate in Kahakuakoi and Kealohapauole by the entirety, with a contingent remainder to the heirs of the body of either, and

that therefore the plaintiff, found to be such heir of the body to one-third, is entitled to one-third of said devise.

## VI.

That the said Court erred in holding that the words "heirs of the body of either," coupled with the devise over to the Trustees, changing the course of descent, are not controlling in the determination of the intention of the testatrix, and in holding that they are merely a part of the evidence and do not control, in that said words do manifest an intention of the testatrix inconsistent with a devise in fee simple.

## VII.

That the said Court erred in not finding and rendering judgment for the plaintiff for one-third of the premises as prayed for, and in not finding for the plaintiff in the amount of damages claimed in the complaint.

WHEREFORE, the plaintiff and plaintiff in error prays that the judgment of said Circuit Court may be reversed, and that the said Court be directed to enter judgment for the plaintiff and plaintiff in error for the one-third of the premises in issue [6] upon the facts found, and that the said Court be directed to ascertain and find the amount of damages to which the plaintiff and plaintiff in error is entitled.

Dated February 19th, 1917.

(S.) CASTLE & WITHINGTON and

(S.) W. C. ACHI,

Attorneys for Plaintiff and Plaintiff in Error.

To Oahu Sugar Company, Limited, Defendant and Defendant in Error, and to Messrs. Frear, Prosser, Anderson & Marx and Thompson, Milverton & Cathcart, Its Attorneys:

Please take notice that a writ of error has issued in this action.

(S.) CASTLE & WITHINGTON and

(S.) W. C. ACHI,

Attorneys for Plaintiff and Plaintiff in Error.

[7]

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney, Plff. and Plff. in Error, vs. Oahu Sugar Co., Ltd., Deft. and Deft in Error. Petition for Writ of Error, Writ of Error, Bond on Writ of Error and Assignment of Errors. Filed February 19, 1917, at 9:50 A. M. J. A. Thompson, Clerk. [8]

---

*In the Supreme Court of the Territory of Hawaii.*

(Stamped \$2.00.)

HELEN K. KINNEY,

Plaintiff and Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant and Defendant in Error.

**Summons.**

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy:

YOU ARE COMMANDED to summon Oahu



Sugar Company, Limited, a corporation, defendant in error, to appear before the Supreme Court of the Territory of Hawaii within twenty (20) days after service hereof, to answer the annexed Petition for Writ of Error, Assignment of Errors and Notice of Helen K. Kinney, plaintiff and plaintiff in error, and have you then there this Writ with full return of your doings thereon.

WITNESS the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 19th day of February, 1917.

[Seal]

J. A. THOMPSON,  
Clerk. [9]

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney, Plaintiff and Plaintiff in Error, vs. Oahu Sugar Company, a Corporation, Defendant and Defendant in Error. Summons Issued at 9:50 o'clock A. M., February 19, 1917. J. A. Thompson, Clerk.

Received Sheriff's Office, Feb. 19, 10:55 A. M. 1917. Honolulu. J. S. Kalakiela. P. J. F. Hackfeld, T. Geo. Rodiek, S. J. F. C. Hagens.

Returned at 1:46 o'clock P. M., February 20, 1917. J. A. Thompson, Clerk.

Served the within Summons as follows:

On Oahu Sugar Company, Limited, a corporation, through George Rodiek, its Treasurer, therein named the defendant in error, at Honolulu, this 19th day of February, A. D. 1917, by delivering to him a certified copy thereof and of the Petition for Writ of Error, Assignment of Errors, Bond and notice annexed

hereto, and at the same time showing him the original.

Dated Honolulu, Feb. 19, 1917.

DICK K. DIAMOND,  
Police Officer. [9½]

---

*In the Supreme Court of the Territory of Hawaii.*

(Stamped \$2.00.)

HELEN K. KINNEY,

Plaintiff and Plaintiff in Error,

vs.

OĀHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant and Defendant in Error.

**Writ of Error.**

To Henry Smith, Clerk of the Circuit Court of the First Circuit, Territory of Hawaii:

WHEREAS, in an action lately pending before the Circuit Court of the First Circuit, Territory of Hawaii, in which Helen K. Kinney is plaintiff and the Oahu Sugar Company, Limited, is defendant, error is alleged to have occurred, as appears by the assignment of errors on file in this court.

You are commanded forthwith to send up to this court the record and all exhibits filed in said proceeding.

WITNESS the Honorable A. G. M. ROBERTSON, Chief Justice of the Supreme Court of the Territory of Hawaii.

[Seal]

J. A. THOMPSON,  
Clerk.

Honolulu, February 19th, 1917.

Received the foregoing Writ of Error on this 19 day of February, 1917.

HENRY SMITH,

Clerk Circuit Court, First Circuit.

Circuit Court, First Jud. Circuit. Feb. 19, 1917.

[10]

In obedience to the within writ to me directed, I herewith send up the record and all the exhibits filed in said above-mentioned cause. Said record being specifically stated in the certificate of the clerk attached to the certified records or pleadings.

HENRY SMITH,

Clerk, Circuit Court, First Circuit, Territory of Hawaii.

Dated at Honolulu, Oahu, H. T., March 5th, 1917.

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. October Term, 1916. Helen K. Kinney, Plaintiff and Plaintiff in Error, vs. Oahu Sugar Company, Limited, a Corporation, Defendant and Defendant in Error. Writ of Error. Filed and Issued February 19, 1917, at 9:50 A. M. J. A. Thompson, Clerk. Returned March 5, 1917, at 2:00 P. M. J. A. Thompson, Clerk. 8487. [11]



*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

JANUARY TERM, A. D. 1916.

(Stamps \$2.)

EJECTMENT.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR CO., LIMITED, a Corporation,  
Defendant.

**Complaint.**

To the Honorable the Presiding Judge of the First  
Judicial Circuit, of the Territory of Hawaii.

The undersigned complains of the Oahu Sugar Company, Limited, a corporation duly created and existing under the Laws of the Territory of Hawaii, defendant, that it has unjustly, and contrary to law and the rights of the plaintiff, taken into its possession and converted to its use and occupation, that certain piece or parcel of land situated at Hanohano. Ewa, City and County of Honolulu, Territory of Hawaii, and being a part of those premises described in Land Commission Award Number 5930 to Puhalahua; and more particularly described as follows, to wit:

“Beginning at a marked rock near the Waigele River, at the mauka corner of Ullumalu; the boundary runs by the magnetic meridian as follows:

N	2° 00' E	594 feet	along	Aulii	Grant	712.
N	60° 00' W	1346	"	"	"	"
N	68° 00' W	264	"	"	"	"
N	24° 00' W	726	"	"	"	"
N	4° 00' W	792	"	"	"	"
N	24° 00' W	396	"	"	"	"
N	34° 30' E	924	"	"	"	"
N	8° 30' W	1399	"	"	"	"
N	25° 00' E	670	"	"	"	"
N	30° 00' W	1023	"	"	"	"
N	39° 00' W	264	"	"	"	"

along Pali to the rock called "Uhakai" at the junction of the Kipapa and Keaakukui gulches;

N 7° 00' W 300 feet more or less, down the pali to a point in the gulch or the boundary of Pouhala;

S 19° 00' W 950 feet more or less across the stream and up the pali to a point on the west bank of the Keaakukui gulch, on the boundary of Pouhala;

S 12° 30' W 914 feet along R. P. 4486 along Pali

S 13° 30' E 755 " " the same;

S 14° 30' W 1463 " " " "

S 23° 00' E 1036 " " " "

S 17° 30' E 235 " " " "

to a marked rock on the edge of the Pali Pohakupili;

N 79° 00' E 231 feet down to marked rock at the foot of the pali at the bend of the river along Waipahu Gr. 122, thence along the river which separates this land from Waipahu to the initial point; Area 145 4/10 acres. [12]

The plaintiff claims an undivided one third of the above-described premises as an heir at law of one John Paalua a grandson of Kahakuakoi and Kealohapauole; said John Paalua was an heir of the bodies of said Kahakuakoi and Kealohapauole, the devisees under the will of Bernice Pauahi Bishop, deceased, at the time of his death; and further the plaintiff claims the said one undivided third of said land by virtue of the terms of said will of Bernice Pauahi Bishop; the plaintiff was a granddaughter of said Kahakuakoi and Kealohapauole, the devisees as aforesaid; and that she is an heir of the bodies of said Kahakuakoi and Kealohapauole deceased; to be the damage of the plaintiff in the sum of Ten Thousand Dollars.

WHEREFORE, the plaintiff asks the process of this Court, to cite the said defendant to appear and answer this complaint before a jury of the country at the January term, 1916, of this Court unless sooner disposed of by judicial authority, and that the plaintiff may have restitution of said property, with damages for its detention, and for costs of this Court.

(Signed.) HELEN K. KINNEY,  
Plaintiff.

Territory of Hawaii,  
City and County of Honolulu,—ss.

Helen K. Kinney, being duly sworn, deposes and says: That she is the plaintiff named in the above-entitled matter; that she has read the foregoing complaint and knows the contents thereof, and that the same are true to the best of her knowledge and belief.

(Sgd.) HELEN K. KINNEY.



Subscribed and sworn to before me this 23d day of May, A. D. 1916.

[Seal] (Sgd.) F. W. McKINNEY,  
Notary Public First Judicial Circuit Territory of  
Hawaii. [13]

[Endorsed]: No. ——. Circuit Court, First Circuit, Territory of Hawaii. January Term 1916. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Limited, a Corporation, Defendant. Ejectment. Complaint. Filed at 10:25 o'clock A. M. May 24th, 1916. (Sgd.) J. A. Dominis, Clerk.  
[14]

---

*In the Circuit Court of the First Circuit, Territory  
of Hawaii.*

Holding Terms at ———, County of ———.

(\$2.00 Stamps.)

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR CO., LIMITED, a Corporation,  
Defendant.

### **Term Summons.**

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy, or any Police Officer:

YOU ARE COMMANDED to summon the Oahu Sugar Co., Limited, a corporation, defendant, in case

it shall file written answer within twenty days after service hereof to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next succeeding term thereof, to wit, The January 1917 term thereof, to be holden at The City and County of Honolulu, on Monday, the 10th day of January next, at 10 o'clock A. M., to show cause why the claim of Helen K. Kinney, Plaintiff should not be awarded to her pursuant to the tenor of her annexed Complaint.

And have you then there this Writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit at Honolulu aforesaid, this 24 day of May, 1916.

[Seal]

(Signed.) J. A. DOMINIS,

Clerk.

[Endorsed]: L. No. 8487. Reg. 5, p. 453. Circuit Court, First Circuit. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Co., Limited, a Corporation, Defendant. Term Summons Issued at 10:25 o'clock A. M., May 24, 1916. (Signed.) J. A. Dominis, Clerk. Received at 3:45 P. M. May 24th, A. D. 1916. (S.) P. Gleason, Deputy High Sheriff. Returned at 1:45 o'clock P. M., May 26, 1916. (S.) J. A. Dominis, Clerk.

Served the within Summons as follows:

On Oahu Sugar Co., Limited, a corporation therein named as defendant, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 25th day of May, A. D. 1916, by delivering to J. F. C. Hagens its Secretary, a certified copy hereof and of the petition or complaint hereto annexed and at the same time showing him the original.

Dated Honolulu, May 25, 1916.

(S.) PATRICK GLEASON,  
Deputy High Sheriff. [15]

---

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

EJECTMENT.

HELEN W. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation.

Defendant.

**Answer.**

Now comes Oahu Sugar Company, Limited, the defendant in the above-entitled action, and for answer to the complaint of the above-named plaintiff filed in the above-entitled court and cause, denies the truth of each and every allegation in said complaint contained.

And for further answer to said complaint the said defendant alleges:

1. That the cause of action alleged in said com-



plaint did not accrue within ten (10) years before the commencement of said action, and that all of the rights, if any, of the said plaintiff in and to the premises described in said complaint, or any part thereof, are barred by the statute of limitations of the Territory of Hawaii.

2. That the said defendant and its predecessors in title and interest, ever since the 28th day of January, A. D. 1893, have been in the continuous occupation and possession of the premises described in said complaint, and have held the same ever since said date under claim of title in fee simple, openly and notoriously, exclusive of all other rights, and adversely to the said plaintiff, and to the world. [16]

WHEREFORE said defendant prays that said action be dismissed, and for its costs and disbursements in said action.

Dated at Honolulu, this 23d day of June, A. D. 1916.

OAHU SUGAR COMPANY, LIMITED,

Defendant Above Named.

By THOMPSON, MILVERTON & CATH-  
CART,

Its Attorneys.

(Sig.) FREAR, PROSSER, ANDERSON &  
MARX, of Counsel.

[Endorsed]: L. No. 8487. Reg. 5, pg. 453. No. ——. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Limited, a Corpora-

tion, Defendant. Answer. Filed at 9:25 o'clock  
A. M. June 24th, 1916. (S.) J. A. Dominis, Clerk.  
[17]

---

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

LAW NO. 8487.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

**Decision.**

This is an action in ejectment to recover a certain piece of land known as Hanohano, situated in Ewa, Island of Oahu.

The plaintiff claims an undivided one-third in said lands as the sole heir at law of one Niulii (w) and Kahaleahu (k), her husband. Niulii, according to the plaintiff's claim, was one of three children of Kahakuakoi and Kealohapauole, her husband, the devisees of the land from Pauahi.

The defendant claims the land as purchaser from one Mark P. Robinson, who purchased the land in foreclosure proceedings on a mortgage given by Kahakuakoa and Kealohapauole during their lifetime, and who also took a quitclaim deed from them and from the surviving two children of this couple, Lydia Kamae (now Mahoi) and George Kealohapauole.

The case was tried jury waived. Under such circumstances I conceive it to be the prime duty of the Court to carefully weigh the evidence and with the nicest exactitude decide the questions of fact involved. His errors of law may be easily and expeditiously reviewed and corrected in a court of appeal; his findings of fact, unless founded on no evidence or on evidence erroneously admitted, are final to the same extent as [18] a verdict of a jury.

Let us therefore first address ourselves to the single question of fact involved, namely, whether or not the plaintiff, admitted to be the child of Niulii, is also the child of Kahaleahu. We will then turn to the questions of law arising.

Certain facts are either admitted, uncontested or so clearly proven by the testimony that there is little difficulty in making findings thereon. They are these:

That Kahakuakoi was a relative of Pauahi. The degree of relationship is not material, but is classed under the same generic Hawaiian term, which is best translated "cousin."

That Kahakuakoi was always treated by Pauahi as a relative, living under Pauahi as one of her numerous retainers at the place known as Aikupika, with other retainers, relatives and servants of Pauahi.

That Kahakuakoi was married to one Kealohapauole and by him had three children, namely, Niulii, Lydia and George.

That Kahakuakoi died September 8, 1910, and Kealohapauole, her husband, died June 8, 1914; that

at the time of the death of Kealohapauole two children of Kahakuakoi and Kealohapauole survived them, namely, George Kealohapauole (or, as he was also known, George Kawelookalani) and Lydia Kamae.

That Niulii was a sister of George and Lydia, last-above named, and that she died on December 12, 1890, leaving surviving her three children, namely, Helen Kalolowahilani, who is the plaintiff herein, John Paalua, and David Kauluhaimalama.

That John Paalua died on or about February 12, 1915, leaving no issue, nor wife, nor mother, nor father.

That David Kauluhaimalama died December 1, 1909, leaving no issue, nor wife, nor mother, nor father. [19]

It would, therefore, appear that at the death of Kealohapauole, who survived his wife, there survived him George Kealohapauole, Lydia Kamae, and the children of Niulii, namely, Helen and John. At the institution of this action on May 24, 1916, the interests of John would have passed to Helen if she was capable of inheriting the same. She would, under such circumstances, be entitled to an equal share with each, George Kealohapauole and Lydia Kamae (now Lydia K. Mahoi).

That by the will of Pauahi (Mrs. Bernice Pauahi Bishop) there was a bequest and devise to Kahakuakoi and Kealohapauole, her husband, under the following terms:

“Fifth: I give and bequeath unto Kahaquakoi (w) and Kealopauole, her husband, and to



the survivor of them the sum of thirty dollars (\$30) per month (not \$30 each) so long as either of them may live. And I also devise unto them, and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue to go to my trustees upon the trusts below expressed."

And by the 11th paragraph of the first codicil to this will it is provided:

"11th. I revoke so much of the fifth article of my said will as devises the land known as 'Mauna Kamala' to Kahuakoi (w) and Kealohapauole, her husband, and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."

That in January, 1890, Kahaquakoi and Kealohapauole made a lease of the land of Hanohano to Mark P. Robinson for the term of fifty years from January 1, 1892.

That on December 15, 1890, Kahakuakoi and Kealohapauole gave a mortgage on the land in question to Messrs. Bishop, Paty and Damon, doing business as Bishop & Company; that this mortgage was assigned to one Peter Dalton and that this mortgage was duly foreclosed and the land sold on foreclosure sale to C. R. Bishop. [20]

That C. R. Bishop, by deed of October 23, 1894, conveyed the land to Mark P. Robinson by quitclaim deed; that Mark P. Robinson, by warranty deed of February 12, 1897, conveyed the land to the Oahu Sugar Co., Ltd., the defendant herein.

That by quitclaim deed dated October 2, 1894, Kahakuakoi, Kealohapauole, George Kealohapauole, and Lydia Kamae, under a consideration named as five dollars, quitclaimed all their interest in the land to Mark P. Robinson.

But it is claimed that the plaintiff herein is not the child of Kahaleahu, the husband of Niulii, and is, therefore, not the legitimate child of Niulii. As both sides seem to admit that the words "heirs of the body" and "issue" include only legitimate children, this becomes the one great question of fact in the case. On this issue of fact evidence was taken almost continuously from November 27, 1916, to January 2, 1917. On this question and on attempts to impeach witnesses testifying to this question forty-nine witnesses were examined. On this question counsel spent nearly four days in summing up. It is manifestly impossible, within the limits of this decision, to attempt to review the testimony or the arguments of counsel.

In order for plaintiff to win in this branch of the case it is necessary for her to show either (1) that Kahaleahu and Niulii were married and that she was born in wedlock, or (2) that she is the child of Kahaleahu and that he subsequently married Niulii, her mother.

There is no record, direct or specific proof of that marriage, either before or after the birth of the plaintiff. She must, therefore, rely on testimony of cohabitation and reputation and on declaration of marriage to prove the same.

It cannot be doubted that in the law, as well as in the [21] reputation of our fellow men, the most respected single piece of evidence of the marriage of a man and woman is their continued cohabitation, and the law, as well as society without the courts, presumes that cohabitation is meritorious rather than meretricious. If, however, the relations were meretricious in their inception, the presumption is that they continued as they were begun, and there must be further evidence to establish the marriage, for relations which are meretricious cannot ripen into connubial relations by mere lapse of time, but are characterized as immoral until a change of purpose is manifested. This change of purpose does not necessarily require direct proof, but may be found in circumstances.

In this case there is an abundance of testimony of cohabitation between Niulii and Kahaleahu. All the witnesses for the plaintiff and many of those for the defendant testify to it.

And this cohabitation was under a general repute of marriage. Again this is fully substantiated by the testimony both of the witnesses of the plaintiff and of the defendant. Among the witnesses for defendant testifying to the reputation of marriage may be cited Mrs. Fanny Norrie, Rebecca Pane, Duke Kahanamoku, Kamala, Puukou, Mrs. Kaahana Dias,

Kaweahu, Malulani, George Napahuelua.

But evidence of cohabitation and matrimonial repute are not sufficient either to prove the existence of a marriage or to raise the presumption thereof when the relations are shown in their inception to have been meretricious. (Reading F. I. Co. & T. Co. Appeal, 113 Pa., 204; Harbeck v. Harbeck, 102 N. Y. 714.) There must be a proof of a subsequent actual marriage. By this I do not mean that there must be testimony of actual eye witnesses [22] to the marriage. Such a rule would in many cases actually defeat justice, but I do mean that in case the inception of the relations was meretricious that it is necessary to prove something more than mere reputation that the parties were cohabiting as man and wife. There must be evidence, either direct or circumstantial, that there had been an actual marriage, either a ceremonial marriage (when this may be by law requisite to a valid marriage) or a contract of marriage *in praesenti*, where that is under the law sufficient to create a marriage between man and woman. In other words, there must be proof of a change in relations; some point where the meretricious relations ceased and the meritorious relations began.

The witnesses for plaintiff seem to agree that in its inception the relations between Niulii and Kahaleahu were not matrimonial, but were meretricious and that Niulii was pregnant before even the reputation of marriage arose. It follows that cohabitation and matrimonial repute and declaration would not, there-



fore, be sufficient to raise the presumption of marriage.

As I have before stated, there is no direct evidence of the marriage, no person in court on the stand who was present at the marriage, no record of the marriage produced. The evidence of marriage is purely that of declaration and family repute, and, as may well be the case, under the peculiar circumstances, confined to the immediate members of the family. In the condition of affairs in which Niulii apparently found herself it is not likely or probable that the marriage ceremony would be any more public than actually necessary. Of the immediate members of the family now living, namely Lydia and George, the latter was too young, being only one or two years old at the date of the birth of the plaintiff, to know the [23] circumstances of a marriage between Niulii and Kahaleahu. Lydia, however, was almost ten years old at the time. She testifies to having seen Niulii and Kahaleahu leave the house together; of their returning together with one Maunakalika (w), and that this Maunakalika there stated in the presence of the parents of Niulii and in the presence of Niulii and Kahaleahu and of the witness that the two were married,—the evident purport of the testimony being that they had been married since leaving the house together. This is the nearest to direct testimony of a marriage in the trial.

Furthermore, the Court may rightfully take into consideration all the surrounding circumstances in reaching a conclusion of marriage or otherwise, and in the case at bar many such circumstances are

valuable in arriving at a finding; the standing of the family, the temper of their great chief and their benefactor under whom they lived and of whose board they were fed, her well-known high ideals in the matter of marital relations, the fact that such an one in making her last will took particular pains to see that Niulii and her brother and sister were provided for. These and many other circumstances which do not rely for their probative value on the strength of human recollection, nor are disturbed by the weakness of human nature,—these, to me, throw the preponderance of weight of testimony on the side of the definite inception of a matrimonial relation. That there was a marriage between Niulii and Kahaleahu I am convinced from the testimony, and so find as a fact.

This leaves two questions of fact remaining, namely, was the marriage before the birth of plaintiff herein, and, second, if after the birth of plaintiff, was Kahaleahu her father?

The evidence on these two points is far from satisfactory. In considering it, however, a few facts must be borne in mind. [24] They are these:

Pauahi was known to be and shown by the testimony herein to be extremely opposed to sexual immorality in those about her; not less so was her husband, Mr. Charles R. Bishop.

Niulii was a kinswoman of Pauahi, a retainer about her house, and under the direct care and guidance of Pauahi. Niulii was a well known young woman. As one witness puts it, "She was a girl who could not be hid." She was of the blood of the aliis.

Niulii was a young girl; at the most she was seventeen or eighteen, probably only fifteen or sixteen.

Kahaleahu, on the other hand, was a commoner, parentage unknown, raised by a Chinaman in Wai-mea, Hawaii.

Kahaleahu was much older than Niulii. He had been once married and had been divorced nearly ten years before the birth of the plaintiff.

Kahaleahu at the time of the birth of the plaintiff had no steady or stated employment. He had been a cook, valet, and general house servant for Mr. Sam Parker.

Keeping these facts in mind, let us consider the opposing stories of this marriage and of the parentage of Niulii.

The account of the affair given by the witnesses for the plaintiff is to the effect that Pauahi, finding her charge Niulii to be pregnant, called Niulii before her and demanding to know who the father of the unborn child was, upon being informed it was Kahaleahu, directed that they be forthwith married.

The story of the only witness for the defendant as to the actual marriage, Becky Pane (which story she testifies she received from Lydia Kamae, an aunt of the plaintiff), is that when Pauahi found that Prince Leleiohoku was not the father [25] of the unborn child, but that the father was one Jim Williams, a negro coachman, she forced Niulii to marry Kahaleahu. This story is altogether too improbable, considering the other testimony, to be given credence. It is quite easy to believe that such a one as Pauahi, with the views she entertained in regard

to promiscuous cohabitation, should even in a matter where her own kinswoman was concerned, require the offending parties to marry, but it is quite unbelievable she would force one of her own blood and of the blood of the aliis to marry such an one as Kahaleahu because she had discovered that another man, even though that man were a colored coachman, was the father of the unborn child.

There was much evidence produced by the defendant to know that at the time of the pregnancy of Niulii and the subsequent birth of the plaintiff Kahaleahu was living in Waimea, Hawaii, and could not, therefore, be the father of the plaintiff. While not passing lightly the weight of this testimony, its value must depend entirely upon a question of dates. In the matter of dates all testimony is unreliable, and the Hawaiian particularly so. In my opinion the case at bar is no exception in this respect.

As between the four putative fathers of plaintiff, Kahaleahu, Prince Leleiohoku, Willie Okai, and Jim Williams, the negro coachman, my own opinion is that the evidence strongly predominates in favor of Kahaleahu, and I find as a fact in this case that Kahaleahu was the father of the plaintiff.

Having already found that Kahaleahu and Niulii were married, it is unnecessary, therefore, to discuss the question of whether that marriage took place before or after the birth of the plaintiff. Our statute legitimatizing bastards upon the marriage of their parents first became law in 1866, long before the birth [26] of the plaintiff. My own opinion from the evidence is, however, that the marriage occurred



a few days before the birth of the plaintiff.

I therefore find that the plaintiff herein is the legitimate child of Niulii and Kahaleahu.

This brings us to a discussion on law points involved. The case on the law was presented with a degree of care and learning never before enjoyed by this Court, the unhappy practice of leaving the trial court to shift for itself in matters of law not having in this case been followed.

The first group of law questions clusters about the construction of the will, the operative words of the devise before quoted. What estate did these create in Kahakuakoi and Kealohapauole? Did the surviving children take under the devise by purchase of descent? Are the words "heirs of the body" words of limitation or of purchase? What is the meaning of the words "of either of them"? Is the case changed by the use of the words "in default of issue?"

The plaintiff claims that the effect of the devise was to give to Kahakuakoi and Kealohapauole an estate for life, an estate in the entirety for life, with this limitation, that upon the decease of the survivor the heirs of either or both of the first takers should take an estate in fee simple, unless there had been a special default of issue; that is, unless at the time of the death of the survivor of Kahakuakoi and Kealohapauole there had been no children of them or either of them surviving.

The defendant claims that it was the expressed intention of the testatrix to create an estate in fee tail, with limitation over to the trustees in case of de-

fault of issue, and that there [27] being no estate in fee tail recognized by Hawaiian law, the legal effect of the devise was to create an estate in fee simple in Kahakuakoi and Kealohapauole.

Much time was spent in argument to the effect that the words "heirs of body" created at the common law an estate in fee tail. It appears to me unquestionable that at the common-law a devise to "A and the heirs of his body" would create a fee tail. Likewise it is clear that under the Hawaiian law an estate in fee tail cannot exist. (*Rooker v. Queen's Hospital*, 12H. 375, 391.)

Likewise it is clear that the rule in *Shelly's Case* that the words "heirs" or the words "Heirs of the body" are words only of limitation (that is, words used only to indicate the kind and quantum of the estate, to limit the line in which the property should descend in case the first taker did not dispose of it during his lifetime, and never of purchase is not the rule in Hawaii, and that the rule will not be followed to defeat the manifest intention of the testator. (*Evans v. Bishop Trust Co.*, 21 H. 74.)

It is likewise agreed that fees simple conditional do not exist under Hawaiian law.

We are, therefore, led to the conclusion that if the testatrix has clearly manifested an intention as to the disposition of her property and that intention is legal and enforceable, such intention will be enforced by the courts of Hawaii, notwithstanding the artificial rules of construction of the common law. (*Rooker v. Queen's Hospital*, 12 H. 399.) Both sides, in fact, invoke this rule. The plaintiff

is certain that it was the intention of the testatrix to grant to Kahakuakoi and Kealohapauole a life estate only with remainder over to the children, [28] who would in such instance, of course, take by purchase. The defendant is equally certain that it was her intention to give to Kahakuakoi and Kealohapauole an estate of inheritance; in which case her children would take, if at all, by descent.

The intention of the testatrix must, of course, be manifested from within the four corners of the will, but the Court may and should, as nearly as possible, place himself in the position of the testatrix at the time the will was made, being careful, however, when the intention is plainly expressed in the words of the will, not to deduce from the surrounding circumstances an intention different therefrom. (*Estate of Boardman*, 5 H. 146, 149.) In the case at bar the Court may and should take into consideration not only the will as a whole and the specific devise under consideration, but also the circumstances in evidence surrounding Pauahi at the time the will was executed, the relations between her and the devisees, between her and the children of the first takers, the dependence of the family upon her bounty at the time the will was made for their home and their subsistence, and any other fact in evidence which will tend to place the Court in the same position the testatrix was in when the devise was made for the purpose of ascertaining her intention in the use of the words of the devise.

Is there any such clearly manifested intention in the devise in question? If there is such intention

manifested, is it enforceable under the laws of the Territory?

It is admitted by both sides that the will is drawn with extreme care and that the testatrix used words in their nicest and most exact meanings. There is no excuse, therefore, to go outside the plain meaning of the words used. [29]

Taking, then, the words of the devise and using the simplest and most common meaning of those words, what do we find?

(1) We find that the devise is to a man and his wife. Under the Hawaiian law this, before the passage of the Married Woman's Act, created an estate in the entirety with the incident right of survivorship. The testatrix must be presumed to have known this and to have known that upon the death of the survivor of the couple, unless the estate could have been and had been conveyed away by the joint act of the first takers, only the heirs of the survivor would take by descent.

(2) By this was evidently not the intention of the testatrix. She desired that the heirs of either should take the inheritance. She therefore provided that the devise should be to the man and his wife and to the heirs of either (meaning, it seems clear to me, the heirs of either and/or, of both.)

(3) But the testatrix did not want the heirs generally of either or both to take. She desired that the descent should be only to the heirs of the body, and she therefore provided that the bequest was to them "and to the heirs of the body of either."

(4) But it is very evident that the testatrix did



not want the heirs generally of the first takers to take in any event, for she provided that "upon default of issue of the same to go to my Trustees." Whether this means a general default of heirs, that is a default at any point in the line of descent is not free from doubt. It is not in issue here, save as aiding in the determination of the testatrix, as there has been neither general nor special default of issue.

Keeping in mind, then, these, that seem to me, manifest intentions of the testatrix in the making of this devise, I am [30] led to the conclusion that one of two things was intended by the testatrix, namely, that either,—

(1) The old folks, Kahakuakoi and Kealohapauole, should take an estate of inheritance by the entirety, which, if not conveyed by the joint act of the couple during life, should descend to the children of the couple, and/or, the children of either of the couple, in case either had children by another, in direct and lineal descent forever; and, in case of a default in such lineal descendants, then to the trustees, or,—

(2) The old folks should take an estate only for life with remainder over to their children or to the children of either by some other in fee simple, and, in case none of such children survived that survivor of the original takers, then to the trustees.

Did she intend to give to Kahakuakoi and Kealohapauole a life estate only? If there is one thing above all others that is shown by this will and codicils it is that the testatrix knew how, when she so desired, to grant a life estate. There are no less than

fifteen estates for life created by this will. In all but one of these gifts identical words are used, namely, "during the term of his (or her or their) natural life." In the one exception the words used are, "to hold for his life, remainder \* \* \* "

It is equally plain that the testatrix knew how to devise lands by proper words to reach the result claimed by the plaintiff herein to have been her intention in the case at bar. Article VI of the first codicil was a gift to a man and his wife, (thereby creating an estate in entirety) for life with remainder over. There the testatrix used the words, "to have and to hold for and during the term of their natural [31] lives and that of the survivor of them; remainder to \* \* \* "

I am irresistibly led to the conclusion that the testatrix meant to give to Kahakuakoi and Kealohapauole something more than a life estate. She meant to give them an estate of inheritance. I am of the opinion that she intended to create an estate in fee tail. In that she was thwarted by the law of Hawaii, which has declared that no such estate exists in Hawaii. The nearest we can approach, therefore, the intention of the testatrix (having decided that she did not intend to create a life estate in Kahakuakoi and Kealohapauole) is to declare the estate which she did create a fee simple estate.

I am not, by so declaring, intending to hold that the testatrix intended to create in Kahakuakoi and Kealohapauole a fee simple estate. It is plain that the testatrix knew well how to create such an estate. I am holding merely that the words she used must be

interpreted to create such an estate; that her apparent intention is not enforceable under the law of Hawaii; that the nearest we may arrive at that intention is to declare that the devise did create a fee simple.

Much stress is laid by the counsel for plaintiff in the rule found in more than one text book that where there are superadded words in a devise which change the course of an inheritance that such words act to change the devise from a devise of inheritance whereby the heirs take, if at all, by descent, to a devise where the heirs take by purchase. This rule appears to me to be not so much a rule of construction as an aid in determining the intention of the testator. As such, it is often of great value, for, if the testator deliberately changes the course of the descent by adding words to the devise indicating his wish contrary to the statute of descent, it would, [32] of course, be evidenced that he intended some added right to thereby attach to the second takers. This could only be done by the second takers taking by some other right than the right of descent, or, in others words, by the second takers taking by purchase. Counsel for plaintiff argues that this devise to kahakuakoi and Kealalohapauole, being a devise of an estate by the entirety, in which only the heirs of the survivor would take by descent, the provisions for the taking by the heirs of either or both, and the provisions that in the default of heirs the estate should go to the trustees are superadded words, changing the course of descent and thereby indicating an intention to give the second takers an estate

by purchase. In this I agree with counsel, and, were it not for the considerations stated, these words changing the course of descent would be well-nigh controlling in my determination of the intention of the testatrix. They are to my mind, however, merely a part of the evidence, items in the proof of the intentions of the testatrix, and do not control.

If, therefore, a fee simple was created, the mortgage, the sale thereunder, the purchase by Charles R. Bishop, and the mesne conveyances through the defendant, all are legal, and the decision and judgment must be for the defendant.

Let judgment enter accordingly.

Honolulu, T. H., February 14, 1917.

[Seal]

(S.) WM. L. WHITNEY,

Second Judge. [33]

[Endorsed]: L. 8487. 6/51. Circuit Court, First Circuit, Territory of Hawaii. Helen K. Kinney, Plff., v. Oahu Sugar Co., Deft. Decision. Filed Feb. 14, 9:57 A. M. 1917. (Sgn.) B. N. Kahalepuna, Clerk. [34]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

JANUARY TERM, 1916.

EJECTMENT.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,  
Defendant.



### Judgment.

This action by petition claiming an undivided one-third of that certain piece or parcel of land situated at Hanohano, Ewa District, City and County of Honolulu, Territory of Hawaii, and being a part of those premises described in Land Commisison Award No. 5930 to Puhalahua and more particularly described as follows, to wit:

Beginning at a marked rock near the Waikele River, at the mauka corner of Ulumalu; the boundary runs by the magnetic meridian as follows:

N	2° 00'	E	594	feet	along	Aulii	Grant	712
N	60° 00'	W	1346	"	"	"	"	"
N	68° 00'	W	264	"	"	"	"	"
N	24° 00'	W	726	"	"	"	"	"
N	4° 00'	W	792	"	"	"	"	"
N	24° 00'	W	396	"	"	"	"	"
N	34° 30'	E	924	"	"	"	"	"
N	8° 30'	W	1399	"	"	"	"	"
N	25° 00'	E	670	"	"	"	"	"
N	30° 00'	W	1023	"	"	"	"	"
N	39° 00'	W	264	"	"	"	"	"

along Pali to the rock called "Uhakai" at the junction of the Kipapa and Keaakukui gulches; [35]

N. 7° 00' W 300 feet more or less, down the pali to a point in the gulch or the boundary of Pouhala;

S. 19° 00' W 950 feet more or less across the stream and up the pali to a point on the west bank of the Keaakukui gulch, on the boundary of Pouhala;

S 12° 30' W 914 feet along R. P. 4486 along Pali;

S 13° 30' E 755 feet along the same;

S 14° 30' W 1463 feet along the same;

S 23° 00' E 1036 feet along the same;

17° 30' E 235 feet along the same to a marked rock on the edge of the Pali Pohakupili;

N 79°00' E 231 feet down to marked rock at the foot of the pali at the bend of the river along Waipahu Gr. 122, thence along the river which separates this land from Waipahu to the initial point;

Area 145 4/10 acres;

and claiming also ~~Fifty Thousand Dollars (\$50,000)~~ damages being at issue came on to be heard before this Court at the January, 1916, Term thereof, a trial by jury having been duly waived, and the parties thereto and their respective attorneys appearing and having been heard, and witnesses examined and arguments made in their behalf, and the said case having been submitted, and this Court having rendered and filed its decision therein on the 14th day of February, 1917, wherein and whereby said Court found and finds in favor of the defendant and against the plaintiff,

NOW, THEREFORE, it is: ADJUDGED that the plaintiff recover nothing by her said action and that the defendant recover of the plaintiff its costs taxed at the sum of Eighty-seven and 90/100 Dollars.  
W. L. W.

By the Court.

[Seal]

(Sgd.) A. K. AONA,  
Clerk.

Entered this 17th day of February, 1917, as of the  
W. L. W. February 14, 1917.

~~January Term, 1916.~~

Let judgment issue.

(S.) WM. L. WHITNEY,

Judge. [36]

[Endorsed]: R. 6/51. L. No. 8487. Reg. 5, pg. 453. Circuit Court, First Circuit, Territory of Hawaii. January Term, 1916. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Limited, Defendant. Judgment. ———, Judge. Filed Feby. 17, 1917, at 12 M. (S.) Henry Smith, Clerk.

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*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

IN ERROR TO THE CIRCUIT COURT OF THE  
FIRST CIRCUIT TERRITORY OF HAWAII.

HELEN K. KINNEY,

Plaintiff and Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corpora-  
tion,

Defendant and Defendant in Error.

**Joinder in Error.**

Now comes the defendant and defendant in error and says that there is no error in the judgment entered in the above-entitled cause by the said Circuit Court of the First Circuit of the Territory of Hawaii, and prays that this Honorable Court may proceed to examine the said judgment and the record

and proceedings in the said cause and the matters assigned for error therein and that the said judgment may be affirmed.

Honolulu, T. H., March 7, 1917.

OAHU SUGAR COMPANY, LIMITED,

By Its Attorneys,

(S.) THOMPSON, MILVERTON & CATH-  
CART,

FREAR, PROSSER, ANDERSON & MARX.

Due service of a copy of the within Joinder in Error this day admitted.

Dated March 7, 1917.

CASTLE & WITHINGTON,

W. C. ACHI,

Attorneys for Plff. & Plff. in Error.

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney vs. Oahu Sugar Company, Ltd. Joinder in Error. Filed March 7, 1917, at 10:45 A. M. J. A. Thompson, Clerk. Thompson, Milverton & Cathcart, Frear, Prosser, Anderson & Marx, 303 Stangenwald Building, Honolulu, Attorneys for Defendant. [37]

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*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

No. 1005.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

Hon. W. L. WHITNEY, Judge.

HELEN K. KINNEY

vs.

OAHU SUGAR COMPANY, LIMITED.



**Opinion.**

Argued May 14, 15, 1917.      Decided May 28, 1917.

ROBERTSON, C. J., QUARLES AND COKE, JJ.

Wills—construction—technical words.

The technical meaning of words used in a will may be subordinated to the real intent of the testator, but the presumption is that technical words were used in their technical sense, and they will be so construed unless the context shows a clear intent to the contrary.

Words and Phrases—"heirs of the body."

The phrase "heirs of the body" is the ordinary, proper and technically accurate one to use in the creation of an estate in fee tail.

Same—"limited."

The word "limited," when used with reference to the creation of an estate in real property, means "defined."

Estates—estate in fee tail—construction.

A testatrix devised land to K and K, her husband, "unto them and to the heirs of the body of either" and "upon default of issue" to trustees appointed by the will. Held, that the testatrix intended to devise to K and K an estate in fee tail, and that, as estates tail cannot exist in Hawaii, the devise took effect as an estate in fee simple in K and K, it not appearing that a life estate in K and K with remainder to the heirs of the body of either would more nearly carry out the intention of the testatrix. [38]

OPINION OF THE COURT BY ROBERT-  
SON, C. J.

This is a writ of error to review the judgment of the Circuit Court of the first circuit in an action of ejectment to recover a tract of land situate at Hanohano, district of Ewa, city and county of Honolulu. The case was tried, jury waived, and judgment was rendered in favor of the defendant.

The plaintiff claimed title to an undivided one-third of the land as one of the heirs of the bodies of Kahakuakoi and Kealohapauole, devisees under the will of the late Bernice Pauahi Bishop, and as heir of a deceased brother. There was evidence that Kahakuakoi and Kealohapauole had three children, Niulii, George and Lydia; that Niulii died in 1890, leaving two children, Helen (the plaintiff) and John Paalua; that Kahakuakoi and Kealohapauole died respectively in 1910 and 1914; and that John Paalua died in 1915. It further appeared that the land was mortgaged on December 15, 1890, by Kahakuakoi and Kealohapauole to Bishop & Company, bankers, and was sold under foreclosure of the mortgage on January 28, 1893. Through mesne conveyances the defendant claims title under the foreclosure deed, and also by adverse possession. On October 22, 1894, Kahakuakoi, Kealohapauole and George and Lydia Kealohapauole executed a deed of all their right, title and interest in the land to the defendant's grantor for a nominal consideration. In the trial court the two principal questions were, one of fact, whether the plaintiff had proven her alleged heirship, which, upon conflicting testimony, was de-

cided in her favor, and one of law, whether she took any estate in the land under the provisions of the will, which was decided against her. This court has only to deal with the question of law. The case has been thoroughly and elaborately briefed and ably argued, but much of the discussion has been of an academic nature and seems not to require attention in all its many phases. [39]

The testatrix died October 16, 1884. In the fifth paragraph of her will she said: "I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of Thirty Dollars (\$30) per month, (not \$30 each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed." The clause was modified in the eleventh paragraph of the first codicil to the will, as follows: "I revoke so much of my said will as devises the land known as 'Mauna Kamala' to Kahakuakoi (w) and Kealohapauole, her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."

On behalf of the plaintiff in error (also plaintiff below) it is contended (1) that at common law the devise would not create a fee tail general or a fee tail at all in Kahakuakoi and Kealohapauole, but

contingent remainders in the heirs of the body of either vesting at death, and in default of heirs of the body of either, then to the trustees; (2) that in Hawaii, even if the devise created a fee tail at common law, this is to be construed as a fee simple, or an estate for life with remainder over, according as such construction will carry out more nearly the intent of the testator drawn from the will and the surrounding circumstances; (3) that the cases of *Nahaolelua v. Heen*, 20 Haw. 372, and *Boeynaeme v. Ah Leong*, 21 Haw. 699, settle the law in Hawaii, that even if a devise or a deed creates at common law a fee tail, if it appears that the testator or the grantor had in mind some benefit for the heirs of the body, the devise or grant will be construed [40] as a life estate in the first taker and remainder over; (4) that the use of the words "of either" and the devise over in default of issue, meaning heirs of the body of either, show that, in the mind of the testatrix, the heirs of the body of either were to take an interest, as they cannot take by descent, they must take by purchase, which would require, under the decision in the *Nahaolelua* case, a holding that the estate created by this will is a life estate by the entirety with remainder over to the heirs of the body of either; (5) that it will be presumed that the testatrix intended to create a legal estate, rather than an illegal one—a devise for the life of the first takers, rather than a fee tail which cannot exist in this Territory; and (6) that the construction contended for is re-enforced by the use of the word "limited" in the codicil, especially if the devise to



the first takers creates a fee simple, for then the devise over is a conditional estate dependent on the defeasance of the fee simple already given.

On behalf of the defendant in error it is contended (1), that the words "heirs of the body of either" are words of inheritance and not of purchase, and the estate would be a fee tail at common law, and also in Hawaii, if fees tail could exist here; (2) that where, as in this Territory, fees tail do not exist, a fee tail, in the absence of controlling words to the contrary, would be a fee simple; (3) that it was the intention of the testatrix to create an estate of inheritance, and not a life estate and remainders; (4) that the word "either," the gift over "upon default of issue," the will and codicils taken as a whole, the legal presumptions, all tend to support that view; and (5) that the intention of the testatrix can better be met by holding that Kahakuakoi and Kealohapauole took title in fee simple, than that they took for life only. The claim of title by adverse possession, and the contention that the defendant [41] has at least the right of possession for a term of years under a lease made by Kahakuakoi and Kealohapauole for fifty years from January 1, 1892, under the view we take of the case, need not be considered.

The will and codicils were drawn with much care and accuracy of expression. It appears from the record in the proceeding for the probate of the will which is in evidence in this case that they were drafted by Francis M. Hatch, at one time a justice of this court, but the language used must, of course,

be regarded as that of the testatrix herself. It is obvious that the testatrix knew how to express an intention to create a life estate and remainder, as well as to devise in fee simple. Thus, in the fourth paragraph of the will, there was a devise of land to L, "to have and to hold for and during the term of her natural life; and after her decease to my trustees upon the trusts below expressed." There were a number of such life estates given by the will and codicils. In the ninth paragraph of the first codicil there was a devise of land and a fishery to D, "to have and to hold with the appurtenances to him, his heirs and assigns forever." In the fifth paragraph of the first codicil there was a devise of land to K and H, his wife, "to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees upon the trusts named in my said will." It would seem, then, that in devising the land in dispute to Kahakuakoi and her husband "unto them and to the heirs of the body of either," and "upon default of issue" to the trustees, the testatrix intended to create an estate other than a fee simple, or a life estate or estates and remainders. What was it? No authority exactly in point has been found.

The word "heirs," though it may be and sometimes is used as a word of purchase, is primarily, ordinarily, and in a strict technical sense, a word of limitation denoting an estate [42] in fee simple. 40 Cyc. 1574; 2 Jarman on Wills (6th ed.), 69; *Thurston v. Allen*, 8 Haw. 392, 402; *Ninia v. Wilder*, 12 Haw. 104, 108; *Iuko v. Holt*, 9 Haw. 88, 91. And, at common law, after the enactment of the statute

*de donis conditionalibus* in 1285, the phrase "heirs of the body" was the ordinary, proper and technically accurate one to use in the creation of an estate in fee tail. 2 Jarman, *supra*; *Rooke v. Queen's Hospital*, 12 Haw. 375, 390; *Nahaolelua v. Heen*, *supra*, at p. 376. In *Pearsol v. Maxwell*, 68 Fed. 513, where there was involved a devise to one and "the heirs of her body," and a contention was advanced for a life estate and remainder, the Court said: "These are the aptest words for the creation of an estate tail. Standing alone, they would admit of no other interpretation." And that they "are strictly and technically words of limitation." And in the same case on appeal the Court said, "that these words, if alone considered, created an estate tail, is hornbook law." 76 Fed. 428. The technical meaning of words used in a will may be subordinated to the real intent of the testator, but the presumption is that technical words were used in their technical sense, and they will be so construed unless the context shows a clear intent to the contrary. 40 Cyc. 1398; *Land Co. v. Barker*, 60 So. (Ala.) 157; *Morse v. Ballou*, 90 Atl. (Me.) 1091; *King v. Johnson*, 83 S. E. (Va.) 1070; *Lane v. Dillon*, 85 S. E. (S. C.) 369; *Black v. Jones*, 264 Ill. 548, 555. "It is a well-settled rule of construction, that technical words of limitation used in a devise, such as heirs generally, or heirs of the body, shall be allowed their legal effect, unless from subsequent inconsistent words it is made perfectly plain that the testator meant otherwise. Or, to use the language of Lord Eldon, in *Wright v. Jesson*, 2 Bligh, 1, the words heirs of the body will indeed yield to a par-

ticular intent that the estate shall be only for life, and [43] that may be from the effect of super-added words, or any expression showing the particular intent of the testator, but that must be clearly intelligible and unequivocal." *Clark v. Smith*, 49 Md. 106, 117. We must hold, therefore, that the intention of the testatrix was to create in the devisees an estate of inheritance—an estate in fee tail—unless we find words in the will which clearly show that the testatrix meant something else.

It is contended that the use of the words "of either," the devise over upon default of issue, the word "limited" in the phrase in the codicil, "to have and to hold as limited in said fifth article of my said will," and the fact that the annuity given by the fifth paragraph of the will was for the life of the annuitants and the survivor of them merely, tend to show an intent on the part of the testatrix that the devise of the land was to be for life only in the first takers. It is argued that the words "of either" in the phrase "and to the heirs of the body of either," would prevent Kahakuakoi and Kealohapauole from taking more than a life estate because each of them might have left heirs, not of their joint bodies, who could not take by descent from the other spouse and, hence, could take only as purchasers. And so it is urged that, in order to carry out the apparent intention, the estate in the first takers must be held to be an estate by the entirety for life, and those of the heirs of the body of either remainders. The first takers, being husband and wife, presumably took by the entirety: *Robinson v. Aheong*, 13 Haw. 196. The statute (R. L. 1915, sec. 3132), providing that all grants



and devises of land to two or more persons shall, unless it manifestly appears to have been otherwise intended, be construed to create estates in common, does not apply here since it was enacted after the will took effect. But we think the conclusion reached by counsel is not sound. [44] The word "either" does not refer to the first takers or necessarily affect the estate devised to them. It relates only to the inheritance. There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances. 2 Jarman on Wills (6th ed.), 267; *Ex parte Tanner*, 20 Beav. 374, 52 Eng. Rep. 647; *Doe v. Green*, 4 M. & W. 229, 150 Eng. Rep. 1414. And we see no reason why the principle should not apply in the case of an estate by the entirety in tail. It is really of no practical importance in this case whether the first takers be regarded as having been tenants by the entirety, joint tenants or tenants in common, and as this case does not involve a controversy between two different sets of heirs of the first takers it is a matter of academic interest only as to how the heirs of one spouse who were not also heirs of the other, had there been such, would have taken. We think, however, that the contention of counsel for the defendant in error that without the words "or either" the descent would have been limited to the heirs of the joint bodies of the first takers, thus creating an estate tail special, and that that word was used to express the intention to create an estate tail general in sound. Under this theory the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during

the life of the surviving spouse. It is to be noted, in this connection, that in the clause in question no words of separation or futurity were used to draw a line of demarcation between the estate of the first takers and that of the heirs. The devise over to the trustees upon default of issue does not militate against the theory of any estate of inheritance. It is not only feasible to limit a remainder after an estate tail upon failure of issue, but, in order to complete the testamentary disposition, is the natural thing for a testator to do. We think the use of the word "limited," in the codicil, does not support the claim [45] of the plaintiff in error. As said in *Anderson's Law Dictionary*, " 'To limit' an estate is to define the period of its duration. The words employed are thence termed 'words of limitation,' and the act itself 'limiting' the estate." *Bouvier* says the limitation of an estate is "The definition or circumscription, in any conveyance, of the interest which the grantee is intended to take." 2 *Bouv. L. Dict.* (3d ed.), 2021. The word "limited" is often used in the sense of "defined," and was so used in the clause referred to. By the provision in the codicil the testatrix meant, and clearly said, that she gave to Kahakuakoi and Kealohapauole, in lieu of the devise contained in the fifth article of the will, the same estate in the land known as Hanohano, as by said article, she had given to them in the land called Mauna Kamala. Nor do we think the fact that the annuity was given to the same devisees for their lives and that of the survivor throws any light on the intention of the testatrix with reference to the devise of the real estate. If, instead of the gift of the annuity,

there had been a devise to the same parties of an express life estate in another piece of land, it could not have been held that it pointed to an intention to create a similar estate in the land of Hanohano. On the contrary, the difference in phraseology would have indicated an intent to create different kinds of estates. We conclude, therefore, that there is no language in the will which shows that the testatrix used the words "heirs of the body" in any other than their usual and technical sense. On the other hand, there is affirmative evidence tending to show that the testatrix did not mean that Kahakuakoi and Kealohapauole were to have an estate for life only. In every instance where the will expressly created an estate for life the remainder was devised to the trustees, and there was a provision in the first codicil that "I hereby give the power [46] to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent, however, after such decease to be paid to my executors or trustees." That provision tends to show that the testatrix did not intend to give an estate in remainder to the heirs of the bodies of Kahakuakoi and Kealohapauole, and is strongly indicative of an understanding on her part that in every case where a life estate had been devised the remainder over was given to the trustees.

The rule is invoked that in case of doubt a testator will be presumed to have intended a legal estate

rather than an illegal one. And it is urged that as fees tail cannot exist in this jurisdiction it should be presumed that Mrs. Bishop did not intend to create an estate in fee tail by the devise in question. The presumption does not operate with much force in the case at bar since an impression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here, and there was no reported ruling to the contrary till the case of *Rooks v. Queen's Hospital* was decided in 1900. In a jurisdiction where fees tail have been abolished the courts would be slow to construe a will executed after the abolition as intending to create such an estate. Such an intention would not be implied. But where the language used in a will shows unmistakably that such was the intention or attempt of the testator the courts cannot do otherwise than recognize the fact and give such effect to it as they may under the law. As to the will in hand we have no doubt as to what the testatrix intended. [47]

It is definitely settled that an estate tail cannot exist or be created in this Territory. *Rooke v. Queen's Hospital*, *supra*; *Nahaolelua v. Heen*, *supra*; *Boeynaems v. Ah Leong*, *supra*. In the absence of statute, what is the proper course for the Court to pursue in a case like this? The ruling in *Nahaolelua v. Heen* was to the effect that the attempt to create a fee tail may be given the effect of creating either an estate in fee simple in the first taker, or a life estate in the first taker and a remainder in fee simple in the issue according to whether the one effect or the other will go more nearly towards carrying out the intention of the grantor or testator in each case. The



other alternative would be to hold the entire grant or devise to be void. But that course has not been adopted here or elsewhere. Here, the plaintiff in error contends for a life estate and remainder on the ground that the will shows an intention on the part of the testatrix to benefit the heirs of the body of the first takers, and, further, because the testimony in the case shows that the plaintiff's grandmother was a cousin of the testatrix, and that the testatrix showed a personal interest in the plaintiff's mother and a practical interest in the welfare of the plaintiff herself. There is nothing in the will, however, beyond the mere limitation to the heirs of the body to indicate that the testatrix intended any benefit to the heirs of the first takers, and, as a futile attempt to create an estate in fee tail is not to be held in every case to create a life estate and remainder, it does not afford a sufficient reason for so holding in the present case. The case of *Nahaolelua v. Heen*, involved the construction of a deed. It there appeared that on August 10, 1871, one Elizabeth K. St. John, the mother of the plaintiffs, in contemplation of marriage, conveyed certain land to trustees to hold upon trust for the use of the trustor until her marriage to one Huakini; to pay the net income to her, after marriage, [48] during her coverture with Huakini; to, in case of her death after marriage and during the lifetime of her husband, leaving issue of the marriage, apply the net income to the maintenance of such issue during minority; and, upon such issue obtaining majority, to convey the land to them. On September 13, 1873, the trustees executed the deed

which required construction. It recited the execution of the prior deed, the marriage of the parties, and the birth of a son; and stated the consideration to be the marriage, the birth of the child, the special request of the grantee, and the payment of one dollar. It conveyed the land to the said Elizabeth Huakini, "and the heirs of her body forever." The deed contained a provision which it was held should be disregarded as being repugnant to the grant, but which, since it was held that the deed attempted to create an estate tail, and that estates tail do not exist in this Territory, could properly be taken into consideration in connection with the question as to how best to approximate the intention of the party, as follows: "In special trust for the use and benefit of her son Edward Nahonoomaui Kia, and such other child or children as may hereafter be born to her, and his or their heirs and assigns forever as he or they shall arrive at the age of legal majority." After referring to the rule that the intention of the parties to a deed is to be ascertained and given effect to if practicable, the Court said: "Applying this rule it is apparent that the intent of the parties to the deed of September 13, 1873, will be most nearly carried out by holding that Elizabeth should take a life estate, with remainder in fee simple to the plaintiffs, 'the heirs of her body.' This view gives effect as nearly as possible to those formal parts of the deed usually regarded as being sufficient, under the law, to pass title." The decision was followed in *Boeynaems v. Ah Leong*, *supra*, where the same deed was involved, without further discussion, and that case, in turn,

was affirmed by the Supreme Court of the United States, [49] without opinion. The facts in the Nahaolelua case were unique, and we think the case was rightly decided; but, except that they included an attempt to create an estate in fee tail, they bear no resemblance to the facts in the case at bar. We reaffirm the ruling made in that case that, in this jurisdiction, when a futile attempt has been made to create an estate in fee tail it will take effect either as a fee simple or a life estate and remainder according to which appears to more nearly effect the intention of the grantor or testator, and hold, further, that ordinarily it will be held to take effect as a fee simple unless something appears which should send it the other way. Whether the Court could go beyond the language of the will and consider the extrinsic testimony as to surrounding circumstances need not be decided as, in our opinion, the testimony referred to in this connection throws no light on the subject. What the testatrix might have done had she been advised that she could not create an estate tail is left to conjecture. There is nothing tending to show a preference for a life estate and remainder.

In a jurisdiction where fees simple conditional, but not fees tail, are recognized an unsuccessful attempt to create an estate in fee tail might take effect as a fee simple conditional. See *Archer v. Ellison*, 5 S. E. (S. C.) 713; *Pierson v. Lane*, 60 Ia. 60. But it was pointed out in *Rooke v. Queen's Hospital*, *supra*, at p. 394, that, for the same reasons that estates tail have no place under the laws of Hawaii, fees simple conditional cannot exist here. In *Jewell v. Warner*, 35 N. H. 176, the court, after showing

that the statutes of New Hampshire relating to wills and the descent of property were irreconcilable with the statute *de donis* and repugnant to the nature of estates tail, said (p. 185), "The restrictive words added to 'heirs' 'of the body,' or 'male or female of the body,' or 'by the body of any particular wife or husband,' are simply inoperative. [50] They create neither an estate tail nor a fee simple conditional, but an estate in fee simple, as if they had been entirely omitted." See, also, *Merrill v. Baptist Union*, 73 N. H. 414. In *Calder v. Davidson*, 59 S. W. (Tex.) 300, 302, where the Court had before it a deed conveying land to "Mary Walker Calder, and the heirs of her body by the said R. J. Calder," it was said, "At the common law the language would have created a fee tail special, and, since estates tail are forbidden in this state, the deed must be held to have vested a fee simple title in the first taker." And see *Rowland v. Warren*, 10 Or. 129. In a jurisdiction where estates tail in real property cannot exist the situation, where there has been an attempt to create such an estate, is somewhat analogous to that where there has been an attempt to create an estate tail in personal property, and, in that case, it is held that the party will take an absolute interest in the property. 10 R. C. L. 657; *Elton v. Eason*, 19 Ves. Jr. 73; *Smith's Appeal*, 23 Pa. St. 9. We take the view that where it does not appear that in the particular case a life estate and remainder would more nearly comply with the ultimate disposition of the property and the direct benefits to be conferred thereby which the grantor or testator had in mind the attempted



fee tail should take effect as a fee simple in the first taker. This, because both are estates of inheritance, and belong to the same genus; both, at common law, were subject to the incidents of dower and curtesy, and were without impeachment of waste; the tenant in tail could bar the entail; an estate tail, in point of law, bears little resemblance to a life estate and remainder; and the law generally favors the first taker. In short, in such a case as this, a holding that the first taker shall have an estate in fee simple will go as near as may be under the law toward effectuating the futile intent to create an estate tail. [51]

We hold that Kahakuakoi and Kealohapauole took under the will and codicil an estate in fee simple in the land in dispute, and that the plaintiff has no interest therein.

The judgment of the Circuit Court is affirmed.

D. L. WITHINGTON (CASTLE & WITHINGTON and W. C. ACHI, on the Brief), for Plaintiff in Error.

W. F. FREAR and J. W. CATHCART (FREAR, PROSSER, ANDERSON & MARX and THOMPSON, MILVERTON & CATHCART, on the Brief), for Defendant in Error.

A. G. M. ROBERTSON,  
RALPH P. QUARLES,  
JAMES L. COKE.

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. October Term, 1916. Helen K. Kinney v. Oahu Sugar Company, Limited. Opinion. Filed May 28, 1917, at 11:37 A. M. J. A. Thompson, Clerk. [52]

*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

No. 1005.

IN ERROR TO THE CIRCUIT COURT OF THE  
FIRST CIRCUIT.

HELEN K. KINNEY

vs.

OAHU SUGAR COMPANY, LIMITED.

**Judgment.**

This cause having come on to be heard, and having been argued by counsel for the respective parties, and the Court having considered the same, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii in this cause be and the same is hereby affirmed.

Entered this 28th day of June, A. D. 1917.

By the COURT.

[Seal]

(Sig.) J. A. THOMPSON,

Clerk.

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney vs. Oahu Sugar Company, Ltd. Judgment. Filed June 28, 1917, at 2:15 P. M. J. A. Thompson, Clerk. [53]

*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

**Petition for Writ of Error from the United States  
Circuit Court of Appeals for the Ninth Circuit  
to the Supreme Court of the Territory of  
Hawaii.**

To the Honorable Chief Justice of the Supreme  
Court of the Territory of Hawaii:

Helen K. Kinney, petitioner in the above-entitled cause, feeling herself aggrieved by the decision and judgment in said cause affirming the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii, which judgment of the Supreme Court of the Territory of Hawaii was entered on the 28th day of June, A. D. 1917, and complaining says: That there is manifest error, to the damage of the petitioner in the same, which errors are specifically set forth in the assignment of errors filed herewith, to which reference is hereby made; that the amount involved in said suit, exclusive of costs, exceeds the sum or value of Five Thousand Dollars (\$5,000), and that it is a proper case to be reviewed by said Circuit Court of Appeals; and therefore your petitioner would respectfully pray that a writ of error be allowed to her in the above-entitled cause and

that she be allowed to prosecute the same to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws [54] of the United States in that behalf made and provided; that an order be made fixing the amount of security which the petitioner shall give and furnish upon said writ of error, and that, upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit; and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings and papers in this cause, duly authenticated, for the correction of the errors so complained of and that a citation and supersedeas may issue.

And your petitioner will ever pray.

Dated Honolulu, T. H., July 28, 1917.

(Signed.) HELEN K. KINNEY,  
Petitioner.

Subscribed and sworn to before me this 27th day of July, 1917.

[Seal] (Signed) W. A. GREENWELL,  
Notary Public, First Judicial Circuit, Territory of Hawaii.

CASTLE & WITHINGTON,  
Attorneys for Petitioner.

The foregoing petition is granted, the writ of error allowed, and the amount of bond on said writ of



error is fixed at 300 Hundred Dollars.

[Seal]            (Sig.) A. G. M. ROBERTSON,  
Chief Justice.

[Endorsed]: Filed August 1, 1917, at 3:20 P. M.  
J. A. Thompson, Clerk. [55]

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*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

**Assignment of Errors.**

Now comes the above-named plaintiff, Helen K. Kinney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

**I.**

That the Court erred in ordering and rendering judgment that the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii in said cause be affirmed, and not reversing said judgment and ordering that judgment be entered in favor of the plaintiff, as prayed for, for the premises involved in said action, and that the amount of her mesne profits be ascertained and a judgment be entered therefor against the defendant.

**II.**

That the said Court erred in entering judgment

for the defendant and against the plaintiff.

### III.

That the said Court erred in holding that the testatrix in [56] making the devise in question unto Kahakuakoi and her husband "unto them and to the heirs of the body of either" and "upon default of issue the same to go to my trustees" did not intend to create a life estate or estates in the said Kahakuakoi and her husband and remainders over.

### IV.

That the said Court erred in holding that the word "either" does not refer to the first takers or necessarily affect the estate devised to them.

### V.

That the said Court erred in holding that there is no reason why an estate by the entirety in tail with several inheritances cannot be created.

### VI.

That the said Court erred in holding that it is of no practical importance in this case whether the first takers be regarded as being tenants by the entirety, joint tenants or tenants in common, and in holding that it is a matter of academic interest only how the heirs of one spouse who were not also the heirs of the other would have taken.

### VII.

That the Court erred in holding that the will is to be construed with reference simply to conditions as to issue which have eventuated and not to conditions which might eventuate under the will as made by the testatrix.

## VIII.

That the said Court erred in holding that the words "of either" express the intention to create an estate tail general, [57] and that the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse.

## IX.

That the said Court erred in holding that the devise over to the trustees upon default of issue does not militate against the theory of an estate of inheritance, in that the Court entirely overlooked the fact that the devise over is in default of issue of either, and that if either left issue that issue would take the entire property, and as the separate issue of one could not inherit from the other as heirs of the body of that other, that separate issue of the one must take by remainder and not by inheritance.

## X.

That the Court erred in failing to give effect to the words of the testatrix, viz., "heirs of the body of either" and the devise over to the trustees "in default of issue," evidently meaning issue of either, which conclusively show that the testatrix intended title to the property to be transmitted, after life estates by the entirety in the first takers, to persons who could not take by descent, and further erred in holding that this intention of the testatrix (found by the Court) that the separate heirs of the body of each, as well as the joint heirs of both, are to take, can be effectuated by an estate by the entirety for life in the first takers and several inheritances, since

the intention of the testatrix is clear that the devise over to the trustees shall not take effect so long as there are heirs of the body of either, separate or joint, and as the separate heirs of the body of one cannot take by descent the separate inheritance of the other, to effectuate this intent of the testatrix [58] the estate must be an estate by the entirety for the lives of the first takers and remainders over to the heirs of the body, whether separate or joint, of the first takers.

### XI.

That the Court erred in refusing to hold that the natural and plain meaning of the language employed by the testatrix is that an estate by the entirety having been created, at the decease of the survivor the entire estate would pass to the heirs of the body of either in case either left heirs of the body, whether heirs of the body of the survivor or not, an intent clearly incompatible with an intent to create an estate tail.

### XII.

That the Court erred in holding that the word "limited" in the codicil and the fact that the annuity was granted for life have no bearing on the construction of the devise in question.

### XIII.

That the Court erred in holding that the provision giving power to certain beneficiaries in the will to make leases for the term of ten years has any bearing on the clause in question.

### XIV.

That the Court erred in holding that the rule



that in case of doubt a testator will be presumed to have intended a legal estate rather than an illegal one has no bearing on the question, and in holding, without evidence, that "an impression seems formerly to have existed—how prevalent it was we do not know—that the fees tail exist here," and in holding that there is in this case an unmistakable intent to create a fee tail. [59]

#### XV.

That the Court erred, while holding the cases of *Nahaolelua v. Heen* and *Boeynaems v. Ah Leong* to be rightly decided and reaffirming the ruling made therein that "when a futile attempt has been made to create an estate in fee tail it will take effect either as a fee simple or a life estate and remainder according to which appears to more nearly effect the intention of the grantor or testator," in holding that ordinarily such estate "will be held to take effect as a fee simple unless something appears which should send it the other way."

#### XVI.

That the Court erred in holding that in the case at bar "there is nothing tending to show a preference for a life estate and remainder," when the will provides and the trial court found that the testatrix intended, at the death of the first takers, the heirs of the body of either to take an interest which they would not take by descent.

#### XVII.

That the Court erred in holding that it must affirmatively appear that in the particular case a life estate and remainder would more nearly comply

with the ultimate disposition of the property and the direct benefits to be conferred thereby which the grantor or testator had in mind, or the devise would be held to take effect as a fee simple in the first taker, in that the same is inconsistent with the ruling in *Nahaolelua v. Heen* and *Boeynaems v. Ah Leong*, reaffirmed in this case, that the estate will be held to be one or the other "according to whether the one effect or the other will go merely towards carrying out the intention of the grantor or testator in each case." [60]

### XVIII.

That the Court erred in holding that the principles of common law should be applied to test the character of fee tail estates in Hawaii, and particularly in ignoring the fact that an estate in tail in Hawaii could not be barred or conveyed by the first taker or that there are any provisions of the common law which would be in force under the law of Hawaii which would favor the first taker.

Dated Honolulu, T. H., Aug. 1st, 1917.

(Sgd.) CASTLE & WITHINGTON,  
Attorneys for Plaintiff.

[Endorsed]: Filed August 1, 1917, at 3:20 P. M.  
J. A. Thompson, Clerk. [61]

*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
the Honorable the Judges of the Supreme Court  
of the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in  
the rendition of judgment in said Supreme Court  
of the Territory of Hawaii, before you, in the case  
of Helen K. Kinney, Plaintiff, vs. Oahu Sugar Com-  
pany, Limited, Defendant, a manifest error has hap-  
pened, to the great prejudice and damage of said  
Helen K. Kinney, petitioner and plaintiff, as is said  
and appears by the petition herein,—

We, being willing that error, if any hath been,  
should be duly corrected, and full and speedy justice  
done to the parties aforesaid in this behalf, do com-  
mand you, if judgment be therein given, that then  
under your seal, distinctly and openly, you send the  
record and proceedings aforesaid, with all things  
concerning the same, to the justices of the United  
States Circuit [62] Court of Appeals for the  
Ninth Circuit, in the City of San Francisco, in the  
State of California, together with this writ, so as

to have the same at the said place in said circuit thirty days after this date, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 1st day of August, 1917.

ATTEST my hand and seal of the Supreme Court of the Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] J. A. THOMPSON,  
Clerk of the Supreme Court of the Territory of  
Hawaii.

Allowed this 1st day of August, 1917.

[Seal] (Sig.) A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii.

[Endorsed]: Filed August 1, 1917, at 3:20 P. M.  
J. A. Thompson, Clerk. [63]

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*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.



**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
the Oahu Sugar Company, Limited, GREET-  
ING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Helen K. Kinney is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. G. M. ROBERTSON, Chief Justice of the Supreme Court of the Territory this 1st day of August, 1917.

[Seal] (Sig.) A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii. [64]

Service of a copy of the within citation upon me is hereby admitted this first day of August, A. D. 1917.  
FREAR, PROSSER, ANDERSON & MARX,  
Attorneys for Defendants in Error.

Service of copy of citation is hereby admitted,  
made 3:55 P. M. of August 1st, 1917.

THOMPSON & CATHCART,

By J. A. M.

Filed and issued for service August 1, 1917, at 3:20  
P. M. J. A. Thompson, Clerk.

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*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant,

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:  
That Helen K. Kinney, as principal, and Henry G. Winkley, as surety, are held and firmly bound unto the Oahu Sugar Company, Limited, in the penal sum of Three Hundred Dollars (\$300), for the payment of which, well and truly to be made to said Oahu Sugar Company, Limited, we bind ourselves and our respective heirs, executors, administrators and assigns firmly by these presents.

The CONDITION of the above obligation is such that, whereas, on the 1st day of August, 1917, the above-bounden principal sued out a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from that certain judgment made and entered in the above-entitled court and cause on the 28th day of June, 1917, by the Supreme Court of the Territory of Hawaii.

NOW, THEREFORE, if the said principal shall prosecute her said writ of error to effect and answer

all damages and costs if she fails to sustain her writ of error, then this obligation shall be void; otherwise [65] it shall remain in full force and effect.

In witness whereof, the said Helen K. Kinney, principal, and Henry G. Winkley, surety, have hereunto set their hands this 1st day of August, 1917.

(Signed.) HELEN K. KINNEY,

Principal.

(Sig.) HENRY G. WINKLEY,

Surety.

The foregoing bond is approved.

[Seal] (Sig.) A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii.

[Endorsed]: Filed August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk. [66]

[Endorsed]: Original. No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Ltd., Defendant. Petition for Writ of Error, Assignments of Error, Writ of Error, Citation on Writ of Error and Bond on Writ of Error. Filed and issued for service August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk. Returned August 1, 1917, at 4:05 P. M. J. A. Thompson, Clerk. [67]

*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant,

**Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
the Honorable the Judges of the Supreme Court  
of the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in  
the rendition of judgment in said Supreme Court of  
the Territory of Hawaii, before you, in the case of  
Helen K. Kinney, plaintiff, vs. Oahu Sugar Com-  
pany, Limited, defendant, a manifest error has hap-  
pened, to the great prejudice and damage of said  
Helen K. Kinney, petitioner and plaintiff, as is said  
and appears by the petition herein,—

We, being willing that error, if any hath been,  
should be duly corrected, and full and speedy justice  
done to the parties aforesaid in this behalf, do com-  
mand you, if judgment be therein given, that then  
under your seal, distinctly and openly, you send the  
record and proceedings aforesaid, with all things  
concerning the same, to the justices of the United  
States Circuit [68] Court of Appeals for the  
Ninth Circuit, in the City of San Francisco, in the  
State of California, together with this writ, so as



to have the same at the said place in said Circuit thirty days after this date, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 1st day of August, 1917.

ATTEST my hand and seal of the Supreme Court of the Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Allowed this 1st day of August, 1917.

[Seal]

A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii. [69]

Filed August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk.

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*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States of America to the  
Oahu Sugar Company, Limited, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Helen K. Kinney is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. G. M. ROBERTSON, Chief Justice of the Supreme Court of the Territory this 1st day of August, 1917.

[Seal]

A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii. [70]

Service of a copy of the within citation upon me is hereby admitted this 1st day of August, A. D. 1917.

[Seal]

FREAR, PROSSER, ANDERSON & MARX,  
Attorneys for Defendants in Error.

Service of copy of citation is hereby admitted, made 3:55 P. M. of August 1st, 1917.

[Seal]

THOMPSON & CATHCART,  
By J. A. M.

Filed and issued for service August 1, 1917, at 3:20 P. M. J. A. Thompson, Clerk.

Returned August 1, 1917, at 4:05 P. M. J. A. Thompson, Clerk.

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*In the Supreme Court of the Territory of Hawaii.*

OCTOBER TERM, 1916.

HELEN K. KINNEY,

Plaintiff,

vs.

OAHU SUGAR COMPANY, LIMITED,

Defendant.

**Stipulation of Facts Admitted on Writ of Error.**

It is stipulated that on any appeal or writ of error taken to obtain a review of the decision and judgment of the above-entitled court in the above-entitled case, a transcript of the testimony and the exhibits in said case need not be taken up, but that on any such appeal or writ of error the following facts, among others, shall be considered as established by said testimony and exhibits:

The land which is the subject of this action is a part of the land known as Hanohano which was awarded by Land Commission Award No. 5930 to Puhalahua.

On November 20, 1873, said land of Hanohano and other lands were conveyed to Bernice P. Bishop for a consideration of \$300.

On October 16, 1884, said Bernice P. Bishop died leaving a will and two codicils, which were duly pro-

bated and full, true and correct copies of which, marked respectively "A," "B" and "C," are hereto attached and made a part hereof. The land demised in the eleventh item of the first codicil is said land of Hanohano. [71]

On January 9, 1890, Kahakuakoi and Kealohapauole, who are named as devisees in said eleventh item of the first codicil, leased said land of Hanohano to Mark P. Robinson for fifty years from January 1, 1892, at an annual rental of \$700, said date of January 1, 1892, being the date of the expiration of a then outstanding lease.

On December 15, 1890, said Kahakuakoi and Kealohapauole made a mortgage of said land of Hanohano and another piece of land to Charles R. Bishop, husband of said testatrix, and others, partners under the name of Bishop & Company, Bankers, for \$3,000, a full, true and correct copy of which mortgage, marked "D" is hereto attached and made a part hereof.

On January 22, 1893, said mortgage having meanwhile been assigned to Peter Dalton and foreclosed by the executors of his will, said land of Hanohano was conveyed to said Charles R. Bishop, the purchaser at the foreclosure sale, at public auction, for \$4,700.

On October 22, 1894, said Kahakuakoi and Kealohapauole and their children, George and Lydia, quitclaimed their interests in said land of Hanohano for a consideration of \$5 to said Mark P. Robinson, a full, true and correct copy of which instrument marked "E" is hereto attached and made a part



hereof, and on the following day October 23, 1894, said Charles R. Bishop conveyed his right, title and interest in said land of Hanohano to said Mark P. Robinson for a consideration of \$6,000.

On February 12, 1897, said Mark P. Robinson conveyed with warranty the portion of said land of Hanohano which is the subject of this action, to the Oahu Sugar Company, Limited, the defendant, for a consideration of stock of the par value of \$150,000 in that company, which was organized at that time, and [72] the said Oahu Sugar Company, Limited, has since held possession of said land and used the same chiefly for artesian wells and pumping plants and the cultivation of sugar cane, a full, true and correct copy of such conveyance marked "F" is hereto attached and made a part hereof.

On August 17, 1906, John Paalua, for a consideration of \$1, gave the plaintiff an option to purchase all of his right, title and interest in said land of Hanohano for \$1,000 at any time within ninety days thereafter; and on July 20, 1914, said George and John Paalua for a consideration of \$1 gave the plaintiff's husband a similar option to purchase for \$1,000 all of their right, title and interest in said land of Hanohano at any time within a year thereafter, and, in case of pending litigation at the end of the year, for a further period of three months from final decree.

Said Kahakuakoi died on September 8, 1910, and said Kealohapauole died on June 8, 1914. Of their children who had not died before said will was made, one, born shortly before the will was made, died shortly after the testatrix died; another, Niulii, the

mother of the plaintiff, died December 12, 1890; two, said George and Lydia, survived said Kahakaukoi and Kealohapauole and are still living. Two grandchildren, namely, Helen, the plaintiff, and said John Paalua, children of the said Niulii, also survived said Kahakuakoi and Kealohapauole. Said John Paalua died February 12, 1915, unmarried and intestate.

Dated Honolulu, T. H., August 14, 1917.

CASTLE & WITHINGTON,

Attorneys for Plaintiff.

THOMPSON & CATHCART,

FREAR, PROSSER, ANDERSON &  
MARX,

Attorneys for Defendant. [73]

**Exhibit "A"—Will of Bernice Pauahi Bishop,**

**Dated October 31, 1883.**

KNOW ALL MEN BY THESE PRESENTS,  
That I, Bernice Pauahi Bishop, the wife of Charles R. Bishop, of Honolulu, Island of Oahu, Hawaiian Islands, being of sound mind and memory, but conscious of the uncertainty of life, do make, publish and declare this my last Will and Testament in manner following, hereby revoking all former wills by me made:

First. I give and bequeath unto my namesakes, E. Bernice Bishop Dunham, niece of my husband, now residing in San Joaquin County, California, Bernice Parke, daughter of W. C. Parke, Esq., of Honolulu, Bernice Bishop Barnard, daughter of the late John E. Barnard, Esq., of Honolulu, Bernice Bates, daughter of Mr. Dudley C. Bates, of San Francisco,

California, Annie Pauahi Cleghorn of Honolulu, Lilah Bernice Wodehouse, daughter of Major J. H. Wodehouse, of Honolulu, and Pauahi Judd, the daughter of Col. Charles H. Judd, of Honolulu, the sum of Two Hundred Dollars (\$200) each.

Second. I give and bequeath unto Mrs. William F. Allen, Mrs. Amoe Haalelea, Mrs. Antone Rosa, and Mrs. Nancy Ellis, the sum of Two Hundred Dollars (\$200) each.

Third. I give and bequeath unto Mrs. Caroline Bush, widow of A. W. Bush, Mrs. Sarah Parminter, wife of Gilbert Parminter, Mrs. Keomailani Taylor, wife of Mr. Wray Taylor, to their sole and separate use free from the control of their husbands, and to Mrs. Emma Barnard, widow of the late John E. Barnard Esq., the sum of Five Hundred Dollars (\$500) each.

Fourth. I give, devise and bequeath unto H. R. H. Liliuokalani, the wife of Gov. John O. Dominis, all of those tracts of land known as the "Ahupuaa of Lumahai," situated on the Island of Kauai, and the "Ahupuaa of Kealia," situated in South [74] Kona Island of Hawaii; to have and to hold for and during the term of her natural life; and after her decease to my trustees upon the trusts below expressed.

Fifth. I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of Thirty Dollars (\$30) per month, (not \$30 each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called "Mauna

Kamala," situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed.

Sixth. I give and bequeath unto Mrs. Kapoli Kamakau, the sum of forty dollars (\$40) per month during her life; to my servant-woman Kaia the sum of Thirty Dollars (\$30) per month during her life; and to Nakaahiki (w) the sum of Thirty Dollars (\$30) per month during her life.

Seventh. I give, devise and bequeath unto Kapaa (k) the house-lot he now occupies, situated between Merchant and Queen Streets in Honolulu, to have and to hold for and during the term of his natural life; upon his decease to my trustee upon the trusts below expressed.

Eighth. I give, devise and bequeath unto Auhea (w) the wife of Lokana (k) the house-lot situated on the corner of Richard and Queen Streets, not occupied by G. W. Macfarlane & Co.; to have and to hold for and during the term of her natural life; upon her decease to my trustees upon the trusts below expressed.

Ninth. I give, devise and bequeath unto my husband, Charles R. Bishop, all of the various tracts and parcels of land situated upon the Island of Molokai, comprising the "Molokai Ranch," and all of the live-stock and personal property [75] thereon; being the same premises now under the care of R. W. Meyer, Esq., and also all of the real property wherever situated, inherited by me from my parents, and also all of that devised to me by my aunt Akahi, except the two lands above devised to H. R. H.



Liliuokalani for her life; and also all of my lands at Waikiki Oahu, situated makai of the government road leading to Kapiolani Park; to have and to hold together with all tenements, hereditaments, rights, privileges and appurtenances to the same appertaining, for and during the term of his natural life; and upon his decease to my trustees upon the trusts below expressed.

Tenth. I give, devise and bequeath unto Her Majesty Emma Kaleleonalani, Queen Dowager, as a taken of my goodwill, all of the premises situated upon Emma Street in said Honolulu, known as "Kaakopua," lately the residence of my cousin Keelikolani; to have and to hold with the appurtenances for and during the term of her natural life; and upon her decease to my trustees upon the trusts below expressed.

Eleventh. I give and bequeath the sum of Five thousand Dollars (\$5000) to be expended by my executors in repairs upon Kawaiahao Church building in Honolulu, or in improvements upon the same.

Twelfth. I give and bequeath the sum of Five thousand Dollars (\$5000) to be expended by my executors for the benefit of the Kawaiahao Family School for Girls (now under charge of Miss Norton) to be expended for additions either to the grounds, buildings or both.

Thirteenth. I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and [76]

maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. I direct my trustees to expend such amount as they may deem best, not to exceed however one-half of the fund which may come into their hands, in the purchase of suitable premises, the erection of school buildings, and in furnishing the same with the necessary and appropriate fixtures, furniture and apparatus. I direct my trustees to invest the remainder of my estate in such manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers, the repairing buildings and other incidental expenses; and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood; the proportion in which said annual income is to be divided among the various objects above mentioned to be determined solely by my said trustees, they to have full discretion. I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. For the purposes aforesaid I grant unto my said trustees full power to lease or sell any portion of my real estate, and to reinvest the proceeds and the balance of my estate in real estate, or in such other manner as to

my said trustees may seem best. I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the [77] government of said schools and to regulate the admission of pupils, and the same to alter, amend and publish upon a vote of a majority of said trustees.

I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some newspaper published in said Honolulu; I also direct my said trustees to keep said school buildings insured in good companies, and in case of loss to expend the amounts recovered in replacing or repairing said buildings. I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular Sect of Protestants.

Fourteenth. I appoint my husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke, and William O. Smith, all of Honolulu, to be my trustees to carry into effect the trusts above specified. I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my said trustees shall be kept at five; and that vacancies shall

be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

Fifteenth. In addition to the above devise to Queen Emma, I also give, devise and bequeath to her, said Emma Kaleleonalani [78] Queen Dowager, the Fish-pond in Kawaa, Honolulu near Oahu Prison, called "Kawa," for and during the term of her natural life; and after her decease to my trustees upon the trusts aforesaid.

Sixteenth. In addition to the above devise to my husband, I also give and bequeath to him, said Charles R. Bishop, all of my personal property of every description, including cattle at Molokai; to have and to hold to him, his executors, administrators and assigns forever.

Seventeenth. I hereby nominate and appoint my husband Charles R. Bishop and Samuel M. Damon, executors of this my will.

In witness whereof I, said Bernice Pauahi Bishop, have hereunto set my hand and seal this thirty-first day of October A. D. Eighteen hundred and eighty-three.

(Signed) BERNICE P. BISHOP. (L. S.)

The foregoing instrument, written on eleven pages, was signed, sealed (published and declared by said Bernice Pauahi Bishop, as and for her last will and testament in our presence, who at her request, in her presence, and in the presence of each other, have hereunto set our names as witnesses thereto, this 31st day of October, A. D. 1883.

(Signed) F. W. MACFARLANE.

(Signed) FRANCIS M. HATCH. [79]



**Exhibit "B"—First Codicil to the Will of Bernice  
Pauahi Bishop, Dated October 4, 1884.**

This is a Codicil to the last Will and Testament of me, Bernice P. Bishop, dated October thirty-first A. D. Eighteen hundred and eighty-three.

1st. I give and bequeath unto Mrs. William F. Allen the sum of One thousand Dollars (\$1000) in place of the amount given to her in my said will.

2d. I revoke the devise to Her Majesty Emma Kaleleonalani of the premises situated upon Emma Street in Honolulu, known as "Kaakopua," contained in the tenth article of my said will; and in place thereof I give, devise and bequeath unto her, said Emma Kaleleonalani, all of those parcels of land situated in Nuuanu Valley, Oahu, on both sides of the road, known as "Laimi"; to hold for and during the term of her natural life; and upon her decease to my trustees upon the trusts expressed in my said will. Said Emma to also have the fish pond known as "Kawa," as provided in the fifteenth article of my said will.

3d. In addition to the bequests to my husband named in my said will I also give, devise and bequeath unto my said husband, Charles R. Bishop, the land known as Waialae-nui, as well as Waialae-iki and also the land known as "Maunalua," Island of Oahu; and also all of the premises situated in said Honolulu, known as the Ili of "Kaakopua," extending from Emma to Fort Street and also all kuleanas in the same, and everything appurtenant to said premises; to hold for his life, remainder to my trustees.

4th. I give, devise and bequeath unto Kuaiwa (k) and Kaakaole (w) old retainers of my parents, that piece of land now occupied by them, situated in upper Kapalama, in said Honolulu, called "Wailuaakio"; to have and to hold for and during the term of their natural lives and that of the survivor of [80] them; remainder to my trustees upon the trusts named in my said will.

5th. I give, devise and bequeath unto Kaluna (k) and Hoopii, his wife, those premises now occupied and cultivated by them in Kauluwela, Liliha Street, Honolulu; to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees upon the trusts named in my said will.

6th. I give, devise and bequeath unto Naiapaakai (k) and Loika Kahua his wife, that lot of land now enclosed and occupied by them, in Kauluwela in said Honolulu, the size of said lot not to exceed one acre; to have and to hold for and during the term of their natural lives, and that of the survivor of them; remainder to my trustees upon the trusts named in my said will.

7th. I give and bequeath unto Lola Kahailiopua Bush, of said Honolulu, the sum of Three hundred Dollars (\$300) per year during her minority, to be applied towards her education and clothing; and upon her becoming of age the sum of One thousand Dollars (\$1000) to her sole and separate use, free from the control of any husband she may marry.

8th. I give and bequeath unto Bernice B. Barnard, of said Honolulu, the sum of Three hundred

Dollars (\$300) a year during her minority, to be applied towards her education and clothing; and upon her becoming of age the sum of One Thousand Dollars (\$1000) to her sole and separate use, free from the control of any husband she may marry. This in lieu of the \$200 given by my will.

9th. I give, devise and bequeath unto my friend Samuel M. Damon, of said Honolulu, all of that track of land known as [81] the Ahupuaa of Moanalua, situated in the District of Honolulu, Island of Oahu; and also the fishery of Kaliawa; to have and to hold with the appurtenances to him, his heirs and assigns forever.

10th. I give and bequeath unto my servants Kaleleku (k) and Kaoliko (k) his brother, each the sum of Twenty Dollars (\$20) per month, during the term of the natural life of each of them.

11th. I revoke so much of the fifth article of my said will as devises the land known as "Mauna Kamala" to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will.

12th. I give and bequeath unto the Bishop's School in Honolulu, called "Iolani College," the sum of Two Thousand Dollars (\$2000); and to the English Sisters School, called "St. Alban's Priory" the sum of Two thousand Dollars (\$2000), and to "St. Andrews Church" in Honolulu, the sum of Two thousand Dollars (\$2000).

13th. I give, devise and bequeath unto Kaiulani Cleghorn, daughter of A. S. Cleghorn, of Honolulu, all of that parecel of land and spring situated at Waikiki-uka, Oahu, known as Kanewai; to have and to hold for and during the term of her natural life; remainder to my trustees upon the trusts named in my said will.

14th. I give and bequeath unto the Rev. Henry H. Parker, of Honolulu, the sum of five hundred dollars (\$500).

15th. I give and bequeath unto Mary B. Collins, if she be with me at the time of my death, the sum of Two hundred Dollars [82] (\$200); and unto Maggie Wynn, if she be then with me, the sum of One hundred Dollars (\$100).

16th. I hereby give the power to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent however, after such decease to be paid to my executors or trustees; provided however that no rent be collected for a longer period in advance at any one time than for six months, and no bonus be taken by said devisees, or any of them, on account of such leases or lease; in either of which cases such lease or leases shall cease and determine, at the option of my executors or trustees, upon the death of such devisee or devisees, who shall have collected rent for a longer period in



advance than for six months, or who shall have taken such bonus.

17th. I give unto the trustees named in my said will the most ample power to sell and dispose of any lands or other portion of my estate, and to exchange lands and otherwise dispose of the same; and to purchase land, and to take leases of land whenever they think it expedient, and generally to make such investments as they consider best; but I direct that my said trustees shall not purchase land for said schools if any lands come into their possession under my will which in their opinion may be suitable for such purpose; and I further direct that my said trustees shall not sell any real estate, cattle ranches, or other property, but to continue and manage the same, unless in their opinion a [83] sale may be necessary for the establishment or maintenance of said schools, or for the best interest of my estate. I further direct that neither my executors nor trustees shall have any control or disposition of any of my personal property; it being my will that my husband, Charles R. Bishop, shall have absolutely all of my personal property of every description. And I give unto my executors named in my said will full power to sell any portion of my real estate for the purpose of paying debts or legacies without obtaining leave of Court; and to give good and valid deeds for the same, the purchasers under which are not to be responsible for the application of the purchase money.

In witness whereof I, said Bernice P. Bishop, have hereunto set my hand and seal this fourth day of October A. D. Eighteen Hundred and eighty-four. The

words "to hold for his life, remainder to my trustees" interlined an 2d page, before signing.

(Signed) BERNICE P. BISHOP. (L. S.)

Signed, sealed, published and declared by the said Bernice P. Bishop as and for a codicil to her last will and testament, in our presence, who at her request, in her presence and in the presence of each other, have subscribed our names as witnesses thereto.

October 4, 1884.

(Signed) WILLIAM W. HALL.

(Signed) FRANCIS M. HATCH. [84]

**Exhibit "C"—Second Codicil to the Will of Bernice Pauahi Bishop, Dated October 9, 1884.**

This is a second Codicil to the last Will and Testament of me, Bernice P. Bishop, dated October thirty-first, A. D. Eighteen hundred and eighty-three:

1st. In addition to the lands devised in the fourth article of my said will to H. R. H. Liliuokalani, the wife of John O. Dominis, I also give, devise and bequeath unto her, said Liliuokalani, all of that tract of land situated in the District of Honolulu, Island of Oahu, adjoining Waialae-nui, known as "Kahala," together with the buildings thereon, and the fishing rights appurtenant thereto; to have and to hold for and during the term of her natural life, remainder to my trustees upon the trusts named in my said will.

2d. In addition to the house lot devised to Kapaa (k), in the seventh article of my said will, which house lot was formerly the property of his wife Akahi, I also give, devise and bequeath unto him, said Kapaa, (k) all of that parcel of land adjoining said house-lot, fronting on Queen Street and extending to

Richards Street, and now under lease to Henry R. Macfarlane; he, said Kapaa, to pay the taxes upon the same and upon the parcel devised by me to Auhea; to have and to hold for and during the term of the natural life of him said Kapaa; remainder to my trustees, upon the trusts named in my said will.

3d. I revoke the devise to Auhea (w) wife of Lokana, set forth in the eighth article of my said will. And I give, devise and bequeath unto said Auhea, that house lot situated on *on* said Richards Street, (not on the corner of Queen Street) formerly occupied by said Auhea, and which was formerly the dwelling of Akahi; the same adjoining the [85] premises under lease to Henry R. Macfarlane but not included in said lease; to have and to hold for and during the term of the natural life of her, said Auhea, free from the control of her husband; remainder to my trustees upon the trusts named in my said will.

4th. Of the two schools mentioned in the thirteenth article of my said will, I direct that the school for boys shall be well established and in efficient operation before any money is expended, or anything is undertaken on account of the new school for girls. It is my desire that my trustees should do thorough work in regard to said schools as far as they go; and I authorize them to defer action in regard to the establishment of said school for girls, if in their option from the condition of my estate it may be expedient, until the life estates created by my said will have expired, and the lands so given shall have fallen into the general fund. I also direct that my said trustees shall have power to determine

to what extent said schools shall be industrial, mechanical, or agricultural; and also to determine if tuition shall be charged in any case.

In witness whereof I, said Bernice P. Bishop, have hereunto set my hand and seal this ninth day of October, A. D. 1884.

(Signed) BERNICE P. BISHOP. (L S.)

Signed, sealed, published and declared by the said Bernice P. Bishop as and for a codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto. October 9th, 1884.

(Signed) G. TROUSSEAU,

(Signed) J. BRODIE. [86]

*Supreme Court of the Hawaiian Islands.*

I hereby certify that the foregoing is a full and true copy of the original will with two codicils of Bernice P. Bishop, on file in the clerk's office of said court, and that said will was duly admitted to Probate by said court on the second day of December, 1884.

Witness my hand and the seal of said court at Honolulu, this 15th day of December, A. D. 1884.

HENRY F. POOR,

Second Deputy Clerk Supreme Court.

Admitted to Probate December 2, 1884. [87]

**Exhibit "D"—Mortgage, Dated December 15, 1890,**

**Kahakuakoi et al. to Charles R. Bishop et al.**

(Stamped \$3.00)

KNOW ALL MEN BY THESE PRESENTS:  
That we, KAHAKUAKOI (w) in her own right



and KEALOHAPAUOLE, her husband, of Honolulu, Island of Oahu, in consideration of Three Thousand Dollars (\$3,000) to us paid by CHARLES R. BISHOP, JOHN H. PATY and SAMUEL M. DAMON, partners and doing business under the firm name of Bishop & Company, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Bishop & Company, FIRST: All of that tract of land situated in Kaliu in said Honolulu, being the same premises conveyed to said Kahakuakoi by deed of M. Aona dated May 15th, 1889, recorded in the Registry Office in Honolulu, Liber 112, pages 486-7. SECOND: All that tract of land known as Hanohano, situated in the District of Ewa, Oahu, described in L. C. A. 5930, to Puhalahua being the same premises devised to us by will of B. Pauahi Bishop. To Have and to Hold the granted premises with all the tenements, hereditaments, rights, privileges, and appurtenances to the same belonging, and all the right, title, estate and interest of every nature whatsoever in law or in equity of either or both of us, dower right of dower, courtesy and homestead and as to the premises second hereinbefore described freed and discharged from any estate tail of us and all remainder estates and powers to take effect after the determination or in defeasance of such estate tail unto said Bishop & Co, and their heirs and assigns forever. Provided nevertheless that if we or our heirs, executors and administrators or assigns shall pay unto the grantees or their executors, administrators or assigns Three Thousand Dollars (\$3,000) in Two

years from this date according to the tenor of our joint and several promissory notes of even date hereof, with interest at the rate of Nine per cent per annum, net above taxes, payable semi-annually and [88] until such payment shall pay all taxes and assessments in the granted premises and the debt hereby secured without charge to the grantees and shall not make or suffer any strip or waste of the granted premises, then this deed as also said note whereby we promise to pay the said principal and interest at the times aforesaid shall be void. But in case we or our heirs or assigns shall fail to pay said interest semi-annually or shall suffer any breach of any of the above conditions, then this note shall become at once due and payable and upon such breach or default or upon nonpayment of said note when due, said grantees, their heirs, representatives or assigns may forthwith enter upon and take possession of all said granted premises and receive the rents and profits thereof or may without first taking possession thereof foreclose this mortgage by suit in equity or sell said granted premises or any part thereof as a whole or in lots with all improvements that may be thereon at public auction in Honolulu, or at such other place as they deem will bring the best price, first publishing such notice of intention to foreclose, of the time and place of sale in the English and Hawaiian languages for three consecutive weeks as is provided by law, and may become purchasers at such sale and as our attorneys in fact irrevocably constituted and appointed may execute and deliver good and sufficient deed or deeds of sale

thereof and may do and perform all other acts and things that may be necessary to carry out this power of sale and such sale shall forever bar us from all interest in the granted premises whether at Law or in Equity, and may apply the proceeds of such sale first to the payment of all costs and expenses of sale or sales as aforesaid with a counsel fee, and then to the payment of all sums then secured hereby whether then or thereafter payable.

In witness whereof we hereunto set our hands and seals this [89] 15th day of December, 1890.

(Sgd.) KAHAKUAKOI.

## Kona

“ D. KEALOHAPAUOLE. X

Kaha.

IMUA o

S. M. KAAUKAI.

Hawaiian Islands,  
Island of Oahu,—ss.

On this 1st day of December, 1890, personally appeared before me Kahakuakoi and D. Kealohapauole, her husband, to me known and known to me to be the persons described in and who executed the foregoing instrument and severally acknowledged that they executed the same freely and voluntarily for the uses and purposes therein set forth. And said Kahakuakoi on an examination separate and apart from her husband acknowledged that she executed the same freely without fear or compulsion of her said husband.

[Seal]

(Sgd.) J. ALFRED MAGOON,  
Notary Public.

Recd. and Compd. this 15th day of Dec., A. D. 1890,  
at 3:45 o'clock P. M. Malcolm Brown, Deputy Reg-  
istrar of Conveyances. [90]

**Exhibit "E"—Deed Dated October 22, 1894,  
Kahakuakoi et al. to M. P. Robinson.**

KAHAKUAKOI et al.

to

M. P. ROBINSON.

DEED dated October 22, 1894.

BOOK 148, page 402.

CONS. \$5.00.

(Stamped \$1.00)

This Indenture made this twenty-second day of October, A. D. 1894, by and between Mrs. Kahakua-koi, David Kealohapauole, George Kealohapauole and Lydia Kamae Kealohapauole, all of Honolulu, Island of Oahu, Hawaiian Islands, of the first part, and Mark P. Robinson of said Honolulu, of the second part, Witnesseth: That the parties of the first part in consideration of Five Dollars (\$5.00) to them paid by the party of the second part, the receipt whereof is acknowledged, have given, granted, bargained, sold and conveyed, and by these presents do give, grant, bargain, sell and convey unto said party of the second part, his heirs and assigns, All their right, title, interest and estate vested, contingent or in expectancy in and to all that tract of land known as Hanohano situated in the District of Ewa, in said Island of Oahu, being the same premises described in Land Commission Award 5930 to Puhalahua, being the same premises devised to the parties



of the first part by the will of Bernice Pauahi Bishop. And also all of the tenements, hereditaments, rents, reversions, privileges, and appurtenances, and all of their right, title and estate in law or in equity, vested contingent or in expectancy, in and to said premises, or to the same appertaining.

To Have and To Hold with the Appurtenances to him, said party of the second part, his heirs and assigns, for his and their use and behoof forever.

In Witness Whereof said parties of the first part have hereunto set their hands and seals the day and year first [91] above written; said David Kealohapauole being the husband of Mrs. Kahakuakoi.

KAHAKUAKOI.

D. KEALOHAPAUOLE.

G. KEALOHAPAUOLE.

LYDIA KAMAE KEALOHAPAUOLE.

In the presence of

N. FERNANDEZ.

Ack. Oct. 22, 1894, by N. Fernandez, Notary Public. Rec. Oct. 23, 1894, at 3:37 o'clock P. M. Thos. G. Thrum. [92]

**Exhibit "F"—Deed Dated February 12, 1897, Mark P. Robinson to Oahu Sugar Company.**

(Stamped \$1.00.)

KNOW ALL MEN BY THESE PRESENTS: That I, Mark P. Robinson, widower residing in Honolulu, Island of Oahu, in consideration of Fifteen Hundred paid up shares of the capital stock of the Oahu Sugar Company, Limited, a corporation established and existing under the laws of the

Hawaiian Islands of the par value each of One Hundred Dollars, issued and delivered to me by the said corporation; the receipt whereof is hereby acknowledged, do hereby give, grant, sell and convey unto the said corporation, the Oahu Sugar Company, Limited, all the land situate in the District of Ewa, known as Hanohano being the same premises described in L. C. A. 5930 to Puhalakua excepting a portion thereof on the upper or mauka end cut off by the new division or boundary line of Waipio and Koalipea; the portion of said land of Hanohano hereby conveyed being bounded and described as follows:

Beginning at a marked rock near the Waikele River, at the mauka corner of Ulumanu, the boundary runs by the magnetic meridian as follows, viz.:

N. 2° 00' E. 594 ft. along Aualii Gr. 712.

N. 60° 00' W. 1346 ft. along Aualii Gr. 712.

N. 68° 00' W. 264 ft. along Aualii Gr. 712.

N. 24° 00' W. 726 ft. along Aualii Gr. 712.

N. 4° 00' W. 792 ft. along Aualii Gr. 712.

N. 24° 00' W. 396 ft. along Aualii Gr. 712.

N. 34° 30' E. 924 ft. along Aualii Gr. 712.

N. 8° 30' W. 1399 ft. along Aualii Gr. 712.

N. 25° 00' E. 670 ft. along Aualii Gr. 712.

N. 30° 00' W. 1023 ft. along Aualii Gr. 712.

N. 39° 00' W. 264 ft. along Aualii Gr. 712 along Pali to the rock called "Uhakai" at the junction of the Kipapa and Keaakukui gulches.

N. 71° 00' W. 300 feet, more or less, down to pali to a point in the gulch, on the boundary of Pouhala.

S. 19° 00' W. 950 feet, more or less; across the stream up the pali to a point on the west bank of the

Keaakukui gulch; on the boundary of Pouhala.

S. 12° 30' W. 914 ft. along R. P. 4486 along Pali

S. 13° 30' E. 755 ft. along the same.

S. 14° 30' W. 1463 ft. along the same.

S. 23° 00' E. 1036 ft. along the same.

S. 17° 30' E. 235 ft. along the same to a marked rock, on the edge of the Pali, called "Pohakupili."

N. 79° 00' E. 231 ft. down to marked rock at the foot of the Pali at the bend of the river, along Waipahu, Gr. 122.

Thence along the river which separates this land from Waipahu to the initial point. Area 145 4/10 acres more or less.

Together with all water rights, flumes, banana houses, engine and [93] engine houses, pumps, boilers and growing crops on said land or belonging thereto. And for the consideration aforesaid I do further sell, grant, and convey unto the said Oahu Sugar Company, Limited, all of the Waipahu Springs (so called) in said land of Hanohano and the water rights thereof and the exclusive and perpetual right to appropriate and use the same and the waters thereof.

TO HAVE AND TO HOLD all and singular the above conveyed premises, water rights and property aforesaid unto the said Oahu Sugar Company, Limited, and its successors and assigns forever.

AND I do hereby for myself, my heirs, executors and administrators covenant with the grantee, its successors and assigns that I am lawfully seized in fee simple of and own all the premises, springs and property aforesaid; that the same are free and clear

of all encumbrances; that I have good right to sell and convey the same as aforesaid, and that I will and my heirs, executors and administrators shall warrant and forever defend the same unto the grantee, its successors and assigns forever against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 12th day of February, A. D. 1897.

MARK P. ROBINSON,

Hawaiian Islands,  
Island of Oahu,—ss.

On this 12th day of February, A. D. 1897, personally appeared before me Mark P. Robinson, known to me to be the person described in and who executed the foregoing instrument, who duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

HARRIET E. WILDER,

Notary Public.

Recorded and compared this 28th day of April, A. D. 1897, at 11:15 o'clock A. M. Thos. G. Thrum, Registrar of Conveyances. [94]

[Endorsed]: No. 1005. Supreme Court, Territory of Hawaii. Helen K. Kinney, Plaintiff, vs. Oahu Sugar Company, Ltd., Defendant. Stipulation. Filed August 18, 1917, at 11:05 A. M. J. A. Thompson, Clerk. [95]



*In the Supreme Court of the Territory of Hawaii.*

HELEN K. KINNEY,

Plaintiff in Error,

vs.

OAHU SUGAR COMPANY, LIMITED, a Corporation,

Defendant in Error.

**Certificate of Clerk to Transcript of Record and  
Return to Writ of Error.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within writ of error, the original whereof is herewith returned, being pages 68 to 69, both inclusive, of the foregoing transcript, and in pursuance to the praecipe to me directed, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 67, both inclusive, and I CERTIFY the same to be full, true and correct copies of the pleadings, record, entries and final judgment which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii in a cause entitled in said court "Helen K. Kinney, Plaintiff in Error, vs. Oahu Sugar Company, Limited, a Corporation," Numbered 1005.

I FURTHER CERTIFY that the original Citation on writ of error and acknowledgments of service

of copy thereof by Messrs. Frear, Prosser, Anderson & Marx, and by Messrs. Thompson & Cathcart, attorneys for the defendant in error, being page 70 of the foregoing transcript, is hereto attached and herewith returned. [96]

I ALSO FURTHER CERTIFY that the original stipulation of facts admitted on writ of error, with Exhibits "A" to "F" thereto attached, being pages 71 to 95, both inclusive, of the foregoing transcript, are hereto attached and herewith transmitted to the Honorable United States Circuit Court of Appeals for the Ninth Circuit.

I LASTLY CERTIFY that the cost of the foregoing transcript is nineteen and 50/100 (\$19.50) Dollars, and that said amount has been paid by the plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 21st day of August, A. D. 1917.

[Seal]

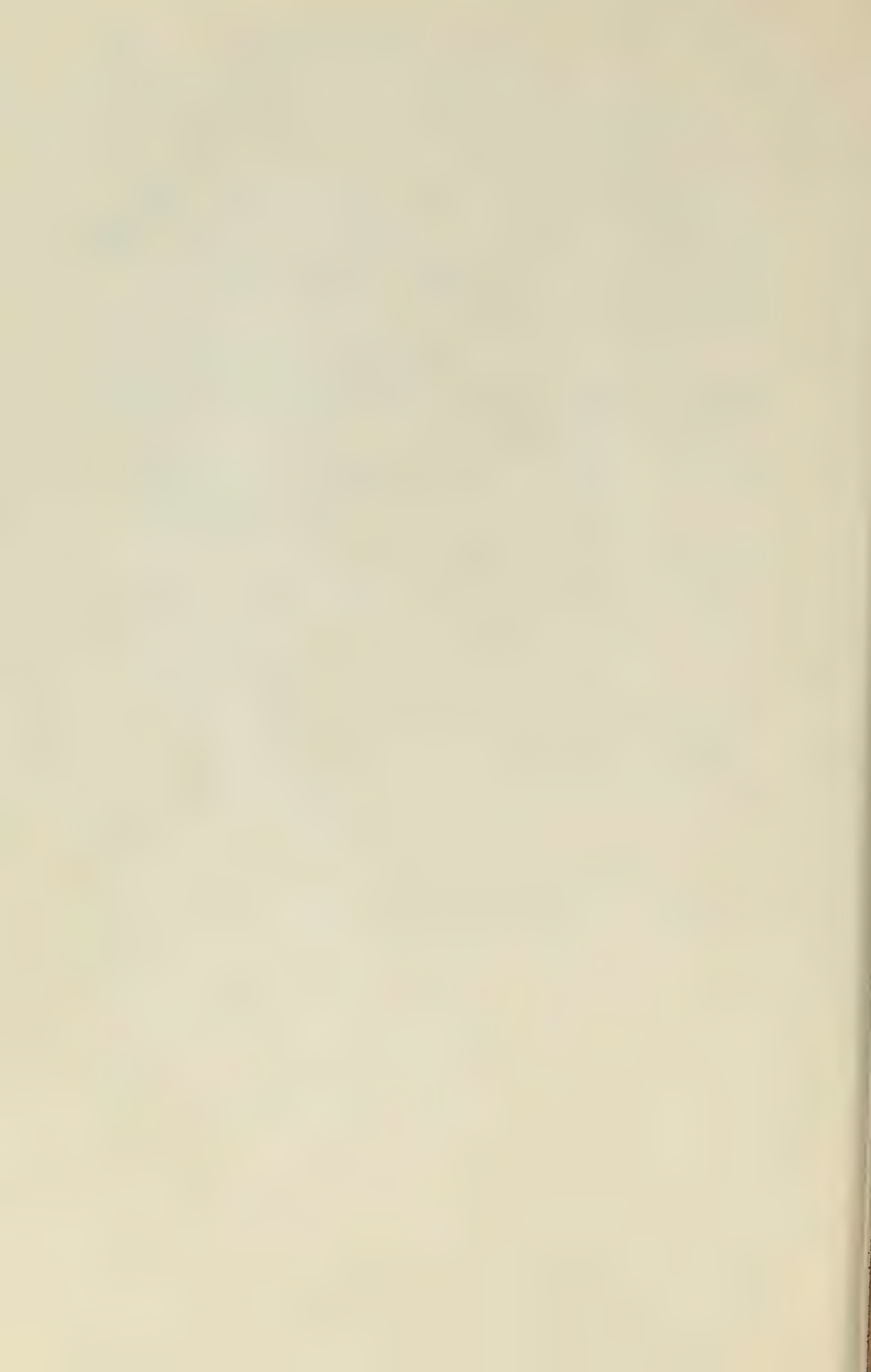
JAMES A. THOMPSON,  
Clerk Supreme Court of the Territory of Hawaii.  
[97]

[Endorsed]: No. 3042. United States Circuit Court of Appeals for the Ninth Circuit. Helen K. Kinney, Plaintiff in Error, vs. Oahu Sugar Company, Limited, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed August 28, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





NO. 3042

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**IN THE UNITED STATES CIRCUIT COURT  
OF APPEALS**

FOR THE  
**NINTH CIRCUIT**

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HELEN K. KINNEY,

Plaintiff in Error,

v.

OAHU SUGAR COMPANY, LIMITED, a Corpor-  
ation,

Defendant in Error.

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**BRIEF FOR PLAINTIFF IN ERROR**

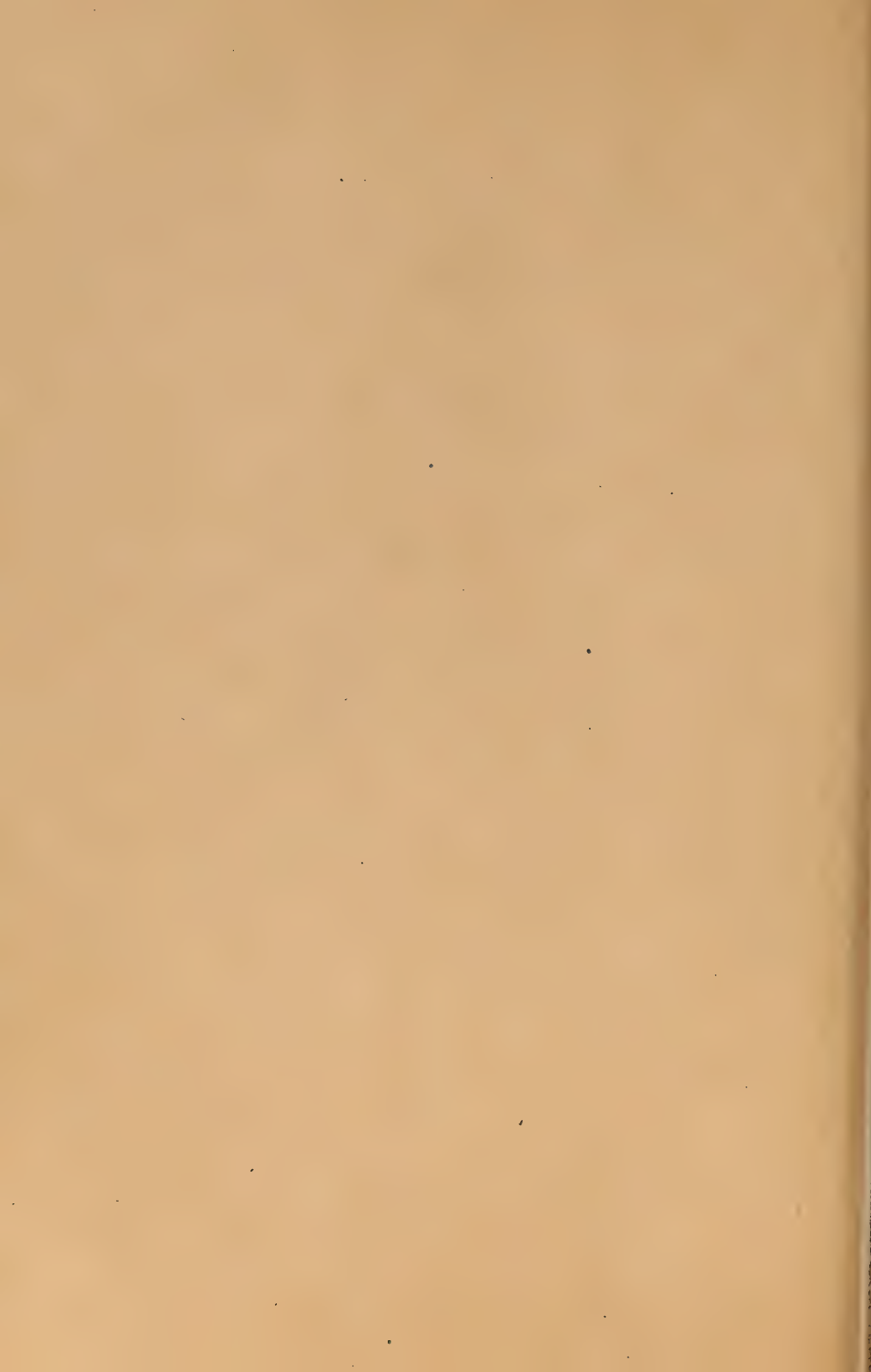
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DAVID L. WITHINGTON,  
Attorney for Plaintiff in Error.

CASTLE & WITHINGTON,  
W. C. ACHI,  
Of Counsel.

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FILED  
FEB 11 1908



# INDEX

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	PAGE.
STATEMENT OF THE CASE.....	1
CLAIMS OF PLAINTIFF AND OF DEFENDANT.....	7
ASSIGNMENTS OF ERROR.....	11
THE HAWAIIAN LAW WHICH MUST GOVERN THE INTER- PRETATION OF THIS WILL.....	16
THE DECISION OF THE COURT.....	21
ARGUMENT .....	29

I. THE DECISION OF THE COURT BELOW IS ERRONEOUS, BECAUSE IT CON-  
STRUES BY AN ARTIFICIAL AND TECHNICAL COURSE OF REASON-  
ING, THE PROVISION WHICH THE TESTATRIX INTENDED TO MAKE,  
AS AN INVALID GIFT, WHICH IT PROCEEDS TO CONVERT INTO AN  
ENTIRELY DIFFERENT VALID GIFT, WHICH THE TESTATRIX DID NOT  
INTEND TO MAKE ..... 29

(a) *Where a devise is susceptible of two reasonable constructions  
one of which is in contravention of law, statutory or gen-  
eral, and the other not, the latter will be preferred, if pos-  
sible without doing violence to the testator's purpose....* 30

(b) *This rule has been applied by the courts in holding that a  
devise should not be held to create an estate in fee tail  
where such an estate is not valid.....* 33

(c) *The rule should be applied even more rigorously to the will of  
a Hawaiian, who was the last of the Kamehamehas.....* 36

II. AT COMMON LAW THE DEVISE WOULD CREATE AN ESTATE BY THE  
ENTIRETY FOR LIFE IN THE FIRST TAKERS, WITH ALTERNATE  
CONTINGENT REMAINDERS AT THE TERMINATION OF THE LIFE  
ESTATE IN THE THEN SURVIVING HEIRS OF THE BODY OF EITHER  
OR IN THE TRUSTEES, AS THE CASE MIGHT BE..... 43

(a) *The decision necessarily holds that an estate by the entirety for  
life was created in Kahakuakoi (w) and Kealohapauole (k)* 44

(b) *There is reason why a remainder in severalty should not be  
implied where a husband and wife take an estate by en-  
tirety for life .....* 44

(c) *That Kahakuakoi (w) and Kealohapauole (k) took for life  
only, and that the testatrix intended to devise the remain-  
der to those persons then living, who should be of the blood  
of both, or either by another; in default of such issue to  
the trustees, is strongly indicated by a careful analysis of  
the several provisions of the two clauses.....* 47

(d) *This conclusion is made clear by the words of explanation "of  
either," and the devise "upon default of issue" to the  
trustees .....* 49

III. EVEN IF THE DEVISE WOULD BE CONSTRUED AS AN ESTATE TAIL AT COMMON LAW, SUCH CONSTRUCTION WOULD NOT BE IN ACCORDANCE WITH THE CURRENT OF JUDICIAL DECISION IN THE UNITED STATES, EVEN WHERE THE COMMON LAW PREVAILS.....	58
IV. WHATEVER THE DEVISE WOULD HAVE CONSTITUTED AT COMMON LAW, UNDER THE HAWAIIAN SYSTEM, THIS DEVISE SHOULD BE CONSTRUED AS A LIFE ESTATE IN THE FIRST TAKERS AND ALTERNATE CONTINGENT REMAINDERS IN THE CHILDREN, OR THE TRUSTEES .....	64
(a) <i>The holding "that the intention of the testatrix was to create * * * an estate in tail" and that there was "no doubt as to what the testatrix intended" is untenable.....</i>	69
(b) <i>The surrounding circumstances, the clear designation of the objects of the testatrix's bounty, and the language of the devise, compel the conclusion that the testatrix intended to provide for faithful dependents during their lifetime; that the estate should then go to the issue of either, who were also at the time of the making of the will, dependent on and the object of the testatrix's care, but in case, at the death of the survivor there was no living issue of either, then to her trustees.....</i>	73
(c) <i>The words "and to heirs of the body of either * * * upon default of issue the same to go to my trustees" are decisive in favor of alternate contingent remainders.....</i>	75
(d) <i>Even if the devise to the first takers be considered indefinite, the limitation over upon death to the trustees supports the construction that a life estate was intended to the first takers .....</i>	78
(e) <i>The recent case of Brede v. First National Bank, 23 Haw. 537, construing the Rooke case, seems decisive that the words "heirs of the body of either" are words of purchase and not of limitation .....</i>	79
V. THE NAHAOLELUA AND BOEYNAEMS DECISIONS, REAFFIRMED IN THIS CASE, HOLD THAT A DEED TO A. AND THE HEIRS OF HER BODY CAN BE CONSTRUED AS EITHER A FEE SIMPLE OR A LIFE ESTATE AND CONTINGENT REMAINDER, AND THAT IF IT APPEARS THAT A FEE SIMPLE WAS NOT INTENDED, THE WORDS WILL BE HELD TO CREATE A LIFE ESTATE AND REMAINDER. IN THIS CASE BOTH COURTS HELD THAT A FEE SIMPLE WAS NOT INTENDED, AND THEREFORE THE DEVISE MUST BE HELD TO BE FOR LIFE WITH A CONTINGENT REMAINDER .....	80
(a) <i>The Nahaolelua and Boeynaems decisions must be construed to hold that since the words in question can be construed either as a fee simple or a life estate and contingent remainder, if it appears that a fee simple was not intended, the words will be construed to create a life estate and remainder .....</i>	80



(b) <i>In the case at bar, where it is found by both the courts that the testatrix did not intend to create a fee simple, and where there are explanatory words showing that she did intend to create a life estate and a remainder, the ruling in these cases, reaffirmed by the court below, necessitates holding this devise to constitute a life estate in the first takers and contingent remainder in the heirs of the body of either</i> .....	86
CONCLUSION .....	88

# CITATIONS

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	PAGE.
Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N. E. 669.....	64
Allen v. Trustees, 102 Mass. 262.....	9
Am. & Eng. Law. vol. 30 (2d Ed.), 667.....	62
Archer v. Ellison, 28 S. C. 233, 5 S. E. 713.....	83
Archer's Case, 1 Rep. 66a.....	56
Awa v. Horner, 5 Haw. 543.....	42, 71
Bird v. Gilliam, 121 N. C. 326, 28 S. E. 489.....	63
Blackstone, vol. 2, p. 116.....	8
Boecynaems v. Ah Leong, 21 Haw. 669, 242 U. S. 612... 8, 14, 15, 27, 28,	82
Bouvier's Law Dictionary .....	51
Branca v. Makuakane, 13 Haw. 499.....	42
Brede v. First National Bank, 23 Haw. 537.....	79, 80
Brown v. Elzey, 83 Ky. 440.....	36
Browne v. Holme, 2 Wm. Bl. 777, 96 E. R. 454 (note), 456, 7.....	56
Calder v. Davidson, 59 S. W. 300.....	83
Campbell v. Manu, 4 Haw. 459.....	42
Castleberry v. Stringer, 176 Ala. 250, 57 So. 849.....	63
Chamberlayne v. Chamberlayne, 6 Ell. & B. 625.....	56, 58
C. & N. P. R. Co. v. Chicago, 172 Ill. 66, 49 N. E. 1006.....	52
Chidester v. S. & I. S. E. R. W. Co., 59 Ill. 87.....	52
Coates v. Burton, 191 Mass. 180, 77 N. E. 311.....	76
Co. Lit. 107, 283.....	46, 53
Cole v. Lake Co., 54 N. H. 242.....	40
Congdon, In re, 6 Haw. 633.....	42
Cooper v. Mitchell Invest. Co., 133 Ga. 769, 66 S. E. 1090.....	35
Cruise, Dig., vol. 6 (3d Am. Ed.) 259.....	60
Crump v. Norwood, 7 Taunt. 362, 129 E. R. 145, 148.....	57
Cyc, vol. 14, 1232 .....	53
Daniel v. Whartenby, 17 Wall. 639.....	59, 61
Dawson v. Quinnerly, 118 N. C. 188, 24 S. E. 483.....	54, 63
Den v. Hardenbergh, 18 Am. Dec. 378 (note).....	46
Denn v. Gillot, 2 T. R. 431.....	45, 53
De Vaughn v. Hutchinson, 165 U. S. 564.....	54, 59, 60, 78
Doe v. Burnsall, 6 T. R. 30, 101 E. R. 419.....	58
Doe v. Green, 4 M. & W. 229, 150 E. R. 1414.....	22, 23, 24, 44, 51, 53
Doe v. Laming, 1 Wm. Bl. 265, 96 E. R. 146.....	57, 58, 84
Du Bois v. Ray, 35 N. Y. 162.....	33
Dunn v. Davis, 12 Ala. 140.....	62
Elphinstone, Interpretation of Deeds, 235.....	45
Farnam v. Farnam, 83 Conn. 369, 77 Atl. 70.....	31
Fearne, Contingent Remainders, 37, 40, 43, 212.....	46, 47, 54
Findley v. Hill, 133 Ala. 229, 32 So. 497.....	62
Frogmorton v. Wharrey, 2 Wm. Bl. 728, 3 Wils. 125.....	53
Gossage v. Taylor, Stiles 325.....	54
Green v. Green, 23 Wall. 486.....	59, 60
Gretton v. Haward, 6 Taunt. 94, 128 E. R. 968.....	56
Haalelea v. Montgomery, 2 Haw. 62.....	42
Hall v. Hankey, 174 Fed. 139.....	64
Hancock v. Butler, 21 Tex. 804.....	36, 84

Harrington's Sons Co. v. U. S. Express Co., 87 N. J. L. 154, 93 Atl. 697	53
Hemen v. Kamakaia, 10 Haw. 547, 554, 555	76
Hewitt v. Green, 77 N. J. E. 345, 77 Atl. 25	32
Houghton v. Kendall, 7 Allen 72	76
Howell v. Knight, 100 N. C. 254, 6 S. E. 721	63
Irvin v. Stover, 67 W. Va. 356, 67 S. E. 1119	62
Jar. on Wills, vol. 2, 252, 267, 536	8, 22, 23, 44, 51
Jarvis v. Wyatt, 11 N. C. 227	35
Jewell v. Warner, 35 N. H. 176	40, 68, 83
Judd v. Hooper, 1 Haw. 13	42
Kake v. Horton, 2 Haw. 209	42
Kay v. Scates, 37 Pa. St. 31, 78 Am. Dec. 399, 406	77
Keelikolani v. Robinson, 2 Haw. 514	16
Kekuke v. Keliiaa, 5 Haw. 437	42
Keliiahonui, In re, 9 Haw. 6	42
Kent's Com., vol. 4, 281	77
King v. Agnee, 3 Haw. 106	42
King v. Hawaiian Trust Co., 21 Haw. 619	53
King v. Robertson, 6 Haw. 718	42
Kuanalewa v. Kipi, 7 Haw. 575	71
Kuuku v. Kawainui, 4 Haw. 515	42
Lane v. Pannel, 1 Rolles 230, 317, 438	54
Lawe v. Davis, 2 Strange 849, 93 E. R. 892, 2 Ld. Raym. 1561, 92 E. R. 511	57, 58
Lewers & Cooke v. Atcherley, 222 U. S. 285	19
Littleton's Tenures, s. 16, s. 283	24, 45, 51
Lodington v. Kime, 1 Salk. 224, 1 Ld. Raym. 203	54, 60
Martelli v. Holloway, L. R. 5 H. L. 532	32
Maughan's Will, 3 Haw. 233	71
May v. Ritchie, 65 Ala. 602	62
McGraw v. McGraw, 176 Fed. 312	32
Merrill v. American Baptist M. Union, 73 N. H. 414, 62 Atl. 647	83
Mossman v. Government, 10 Haw. 421	42
Mouritz v. Lewis, 12 Haw. 19	78
Mudge v. Hammill, 21 R. I. 283, 43 Atl. 544, 79 A. S. R. 802	54
Myrick v. Heard, 31 Fed. 241	64
Nahaolelua v. Heen, 20 Haw. 372	8, 14, 15, 27, 28, 82
Nebinger v. Upp, 13 Serg. & R. 65	63
Ninia v. Wilder, 12 Haw. 104	42, 54, 68
North v. Martin, 6 Sim. 266, 58 E. R. 593	57
Paahana v. Bila, 3 Haw. 725	71
Paaluhi v. Keliiahaleole, 11 Haw. 101	78
Paiko v. Boeynaems, 22 Haw. 233, 240	78
Patrick v. Morehead, 85 N. C. 62, 39 Am. Rep. 684	63
Perrin v. Blake, Har. Lt. 489, 504, 10 E. R. C. 707	57
Perry on Trusts, vol. 1, 381	32
Pierson v. Lane, 60 Ia. 60	83
Porter v. Union Trust Co., 182 Ind. 637, 108 N. E. 117	31
Price v. Price, 5 Ala. 581	62
Puukaiakea v. Hiaa, 5 Haw. 484	42
Puuku v. Kaleleku, 8 Haw. 80	42

	PAGE.
Quincy v. Attorney General, 160 Mass. 431, 35 N. E. 1066.....	33
Right v. Creber, 2 B. & C. 866, 108 E. R. 322.....	57
Robert v. West, 15 Ga. 122, 145.....	35
Robinson v. Aheong, 13 Haw. 196.....	44, 71, 78
Rooke v. Queen's Hospital, 12 Haw. 371.....	7, 26, 28, 30, 40, 42, 58, 77
Rowland v. Warren, 10 Ore. 129.....	85
Shelley's Case, 1 Coke 88.....	42, 59, 60, 84, 85
Simerson v. Simerson, 20 Haw. 57.....	82
Simonton v. White, 93 Tex. 50, 53 S. W. 339.....	84
Sisson v. Seabury, 1 Sumner 235.....	55
Stuckey v. Keefe's Ex'rs, 26 Pa. St. 399, 18 Am. Dec. 378.....	46
Summers v. Smith, 127 Ill. 645, 21 N. E. 191.....	34
Tanner, Ex Parte, 20 Beav. 374, 52 E. R. 647.....	22, 24, 44, 45, 51
Thompson v. Crump, 138 N. C. 32, 50 S. E. 457.....	63
Thurston v. Allen, 8 Haw. 392.....	42
Thurston v. Bishop, 7 Haw. 421.....	19
Thurston Fund. Law, 1, 3, 138, 140, 154.....	18, 19
Towle v. Doe, 97 Me. 427, 54 Atl. 1072.....	32
Underwood, Willis, vol. 2, sec. 536.....	23
Vida, In the matter of, 1 Haw. 63.....	42
Wailehua v. Lio, 5 Haw. 519.....	71
Waters v. Bishop, 122 Ind. 516, 24 N. E. 161.....	76
Watson v. Williamson, 129 Ala. 362, 30 So. 281.....	62
Williams v. McConico, 36 Ala. 22.....	62
Wood v. Ladd, 1 Haw. 17.....	42
Zupplein v. Austin, 6 Haw. 8.....	71



**No. 3042**  
**IN THE UNITED STATES CIRCUIT COURT OF APPEALS**  
**FOR THE**  
**NINTH CIRCUIT**

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<p><b>HELEN K. KINNEY,</b> Plaintiff in Error,</p>	}	
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v.

<p><b>OAHU SUGAR COMPANY,</b> LIMITED, a Corporation, Defendant in Error.</p>	}	
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**BRIEF FOR PLAINTIFF IN ERROR**

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**STATEMENT OF THE CASE**

This is an action of ejectment in which the plaintiff seeks to recover an undivided third of a portion of the land of Hanohano, in the City and County of Honolulu, Territory of Hawaii, claiming in her own right and as the heir of her brother, John Paalua, as "heirs of the body," in common with her aunt and uncle, Lydia Kamae Mahoe and George Kealohapauole, of their grandparents, Kahakuakoi (w) and Kealohapauole (k), her husband, under a devise in the will of Bernice Pauahi Bishop, the last of the Kamehamehas, who died October 16, 1884. Kahakuakoi died September 8, 1910, and Kealohapauole, her husband, died June 8, 1914, leaving as surviving chil-

dren, Lydia and George; a grandson, John Paalua, son of a daughter, Niulii, who died December 12, 1890, and her husband, Kahaleahu; and the plaintiff, claiming to be the child of said Niulii and Kahaleahu.

The specific provision of the will is as follows:

"Fifth: I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of thirty dollars (\$30) per month, (not \$30 each) so long as either of them may live. And I also devise unto them, and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue to go to my trustees upon the trusts below expressed." (Tr., pp. 79, 80.)

And by the 11th paragraph of the first codicil to this will it is provided:

"11th. I revoke so much of the fifth article of my said will as devises the land known as 'Mauna Kamala' to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will." (Tr., p. 87.)

The defendant claims title to the premises under a deed dated October 22, 1894, from Kahakuakoi, Ke-

alohapauole, George Kealohapauole and Lydia Kamae Kealohapauole to Mark P. Robinson, in which, in consideration of Five Dollars, the grantors quitclaimed to said Robinson

"All their right, title, interest and estate vested, contingent or in expectancy in and to all that tract of land known as Hanohano situated in the District of Ewa, in said Island of Oahu, being the same premises described in Land Commission Award 5930 to Puhalahua, being the same premises devised to the parties of the first part by the will of Bernice Pauahi Bishop. And also all of the tenements, hereditaments, rents, reversions, privileges, and appurtenances, and all of their right, title and estate in law or in equity, vested contingent or in expectancy, in and to said premises, or to the same appertaining." (Tr., pp. 96, 97.)

and under the foreclosure of a mortgage given by Kahakuakoi and Kealohapauole December 15, 1890, to Bishop & Company and a sale to Charles R. Bishop who quitclaimed his interest in said land on the 23rd day of October, 1894, to said Mark P. Robinson for \$6000 (Tr., pp. 76, 77), and a conveyance, with warranty, from said Mark P. Robinson to the defendant for stock of the par value of \$150,000 in the defendant company on February 12, 1897 (Tr., pp. 77, 97) ; but denied that the plaintiff was an heir of the body of Kahakuakoi and Kealohapauole, the defendant admitting that the plaintiff was a child of Niulii, who was the daughter of Kahakuakoi and Kealohapauole, but denying her legitimacy.

“On this issue of fact evidence was taken almost continuously from November 27, 1916, to January 2, 1917. \* \* \* forty-nine witnesses were examined. On this question counsel spent nearly four days in summing up,”

the court finding that the plaintiff was the legitimate child of Niulii and Kahaleahu, born after their marriage. (Tr., pp. 28, 29.) The court also found (Tr., p. 26) :

“Niulii was a kinswoman of Pauahi, a retainer about her house, and under the direct care and guidance of Pauahi. Niulii was a well-known young woman. As one witness puts it, ‘She was a girl who could not be hid.’ She was of the blood of the aliis.”

The court also found that at the time of making the will the first takers and their children were dependent upon the testatrix “for their home and their subsistence.” (Tr., p. 31.)

The court also found that John Paalua, brother of the plaintiff, died on or about February 12, 1915, leaving no issue, nor wife, nor mother, nor father, and that his interest passed to Helen and, therefore she was entitled to an equal share with George Kealohapauole and Lydia Kamae Mahoe. (Tr., p. 20.)

The only question remaining is a question of law, whether the plaintiff took under the will of Mrs. Bishop, as an heir of the body of Kehakuakoi and Kealohapauole at the decease of the survivor Kealo-



hapauole with her brother, an undivided third of the property in question.

This is the only instance in which the words "heirs of the body" are mentioned in the will. There are two devises of land in fee simple in the will and codicils. In item 9th of the first codicil a devise is made to Samuel M. Damon of the Ahupuaa of Moanalua, "to have and to hold \* \* \* to him, his heirs and assigns forever" (Tr., p. 87) ; and a residuary devise under the will "unto the trustees below named, their heirs and assigns forever." (Tr., p. 81.)

The devises of lands for life vary somewhat in form and may be classified under three classes :

(1) To husband and wife: First codicil, clause 4, to Kuaiwa (k) and Kaakaole (w), "to have and to hold for and during the term of their natural lives and that of the survivor of them; remainder to my trustees" (Tr., p. 86) ; First codicil, clause 5, to Kaluna (k) and Hoopii, his wife, "to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees" (Tr., p. 86) ;

(2) A devise, second codicil, clause 3, to Auhea (w), wife of Lokana, "to have and to hold for and during the term of the natural life of her, said Auhea, free from the control of her husband; remainder to my trustees."

(3) Devises in five slightly varying forms:

(a) "To have and to hold for and during the term of her natural life; and after her decease to my trustees," Will, clauses 4, 15.

(b) "To have and to hold for and during the term of (his or her) natural life; upon (his or her) decease to my trustees," Will, clauses 7, 8, 9, 10; First Codicil, clause 2. In the last two instances the word "and" is introduced before the word "upon."

(c) "To have and to hold for and during the term of her natural life; remainder to my trustees," First Codicil, clause 13; Second Codicil, clause 1.

(d) "To have and to hold for and during the term of the natural life of him, said Kapaa; remainder to my trustees," Second Codicil, clause 2.

(e) To her husband to whom in her will she had made under clause 9 numerous bequests under form (b), "to hold for his life, remainder to my trustees," First Codicil, clause 3.

The words "heirs of the body" and "upon default of issue" are not used elsewhere in the will. The trustees referred to were devisees of all the rest and residue of her estate, to whom it was devised to establish the Kamehameha Schools.

At the time of making the will, estates by the entirety were recognized in Hawaii, but estates tail had no place under the laws of Hawaii, and neither they nor fines and recoveries had ever been recognized in the history of the Islands; they were inconsistent. Its statutes conflicted with the idea of their existence, and the English system of common law was not adopted until nine years after the making of the will, and rules of property followed in England in the construction of wills were considered out of joint with the times, particularly where they

overruled the intention of the testator, as in the rule in *Shelley's Case*. (Frear, J. in *Rooke v. Queen's Hospital*, 12 Haw. 375.)

# CLAIMS OF PLAINTIFF AND OF DEFENDANT.

Plaintiff's claim:

(1) That Kahakuakoi (w) and Kealohapauole (k) took under the devise an estate by the entirety for their joint lives and the life of the survivor.

(2) That the "heirs of the body of either" took a contingent remainder as tenants in common, which became vested at the termination of the estate for life by the entirety.

Defendant's claim, sustained by the court:

(1) That Kahakuakoi (w) and Kealohapauole (k) took under the devise two estates:

(a) An estate by the entirety for their joint lives and the life of the survivor.

(b) Subject to (a), Kahakuakoi and Kealohapauole took tenancies in common in tail.

(2) That the tenancies in common in tail were converted into tenancies in common in fee simple since a fee tail cannot exist under the laws of Hawaii, is repugnant to the Hawaiian conception of estates and to the Hawaiian statutes, so that as a result Kahakuakoi (w) and Kealohapauole (k) took tenancies in

common in fee simple, subject to an estate for life in themselves by the entirety.

(3) That the trustees took an alternative contingent remainder which vested "upon default of issue" of *either* living at the termination of the estate by the entirety for life.

(3) That the "heirs of the body of either" take nothing.

(4) That if an estate tail were created under the common law by the devise, under the decisions in *Nahaolelua v. Heen*, 20 Haw. 372, and *Boeynaems v. Ah Leong*, 21 Haw. 699, 242 U. S. 612, it would be converted into an estate for life in the first takers with a remainder in fee simple in the "heirs of the body of either."

(4) No claim as to the estate taken by the trustees.

As the husband and wife of the tenant entailed are entitled to curtesy and dower (2 Bl. 116), and as it is clear that the devise to the trustees does not take effect unless there are no heirs of the body of either, cross remainders would be implied (2 Jar.\*



536, *Allen v. Trustees*, 102 Mass. 262), we restate what would happen under the respective claims of the parties:

PLAINTIFF'S CLAIM.

1. Ka. and Ke. took a life estate by the entirety.

2. The heirs of the body of either and the trustees took alternate contingent remainders, dependent upon their being heirs of the body of either at the decease of the survivor of Ka. and Ke.

DEFENDANTS' CLAIM.

1. Ka. and Ke. took a life estate by the entirety.

2. Ka. and Ke. took tenancies in common in tail subject to (1).

3. The spouse of Ka. or Ke. if another at the death of the survivor take an estate by curtesy or dower, as the case might be.

4. Estates tail by way of cross remainder would be created in the respective heirs of the body of Ka. and Ke. on failure of the heirs of the body of either, with the incidents of curtesy and dower.

5. On the indefinite failure of issue of both Ka. and Ke., a contingent remainder to the trustees.

A complete and valid devise under Hawaiian law, to the persons Mrs. Bishop intended to benefit.

6. That as all the claim excepting (1) is void under the Hawaiian law, in place of what Mrs. Bishop intended, the law will construe the devise as a fee simple, which she did not intend, and convert the contingent remainder to the trustees into an executory devise, subject to the dower or curtesy of any surviving spouse of the survivor.

The claim of the defendant was not sustained by the Circuit Court, which apparently decided the case on the theory that at common law an estate tail could be docked by the tenant's conveyance, an obvious error, but was sustained by the Supreme Court of Hawaii. Neither the defendant nor the latter court defined the estate the trustees would take, whether by way of remainder or executory devise, whether at the termination of the life estate by the entirety, upon default of issue, or upon an indefinite failure of issue, whether upon default of issue of one

of the tenants in common, the trustees took at the decease of that tenant, subject, in case one of the spouses survived to his or her estate; or whether it was upon failure of issue of both, and whether that failure was upon a definite failure or an indefinite failure of issue. These questions the court disposed of by saying:

“As this case does not involve a controversy between two different sets of heirs of the first takers, it is a matter of academic interest only as to how the heirs of one spouse, who were not also heirs of the other, had there been such, would have taken.” (Tr., p. 49.)

holding that the words “of either” required a construction that the separate heirs of the body of either would take, but finding it unnecessary to decide how.

It will be seen that under the claims of both parties and under the decision of the Supreme Court of Hawaii, the immediate estate is a life estate by the entirety in the first takers.

### *ASSIGNMENTS OF ERROR.*

(1) The Supreme Court of Hawaii erred in affirming the judgment of the Circuit Court in favor of the defendant, and not reversing that judgment and ordering judgment in favor of the plaintiff as prayed for, and directing the amount of mesne profits to be ascertained, and that judgment be entered therefor for plaintiff and against defendant.

(2) The court erred in holding that the devise in question unto Kahakuakoi and Kealohapauole, her husband, "unto them and to the heirs of the body of either" and "upon default of issue the same to go to my trustees" did not create a life estate or estates in the said Kahakuakoi and Kealohapauole, her husband, and a remainder over.

(3) The court erred in holding that the word "either" does not refer to the first takers or necessarily affect the estate devised to them.

(4) The court erred in holding that there is no reason why an estate by the entirety in tail with several inheritances cannot be created.

(5) The court erred in holding that it is of no practical importance in this case whether the first takers be regarded as being tenants by the entirety, joint tenants or tenants in common, in holding that it is a matter of academic interest only how the heirs of one spouse who were not also heirs of the other would have taken, and in holding that the will is to be construed with reference simply to conditions as to issue which have eventuated and not to conditions which might eventuate under the will as made by the testatrix.

(6) The court erred in holding that the words "of either" express the intention to create an estate tail general, and that the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse.

(7) The court erred in holding that the devise



over to the trustees upon default of issue does not militate against the theory of an estate of inheritance, in that the court entirely overlooked the fact that the devise over is in default of issue of either, and that if either left issue that issue would take the entire property, and as the separate issue of one could not inherit from the other as heirs of the body of that other, that the separate issue of the one must take by remainder and not by inheritance, and in failing to give effect to the words of the testatrix, viz., "and to the heirs of the body of either" and the devise over to the trustees "in default of issue," evidently meaning issue of either, which conclusively show that the testatrix intended title to the property to be transmitted, after life estates by the entirety in the first takers, to persons who could not take by descent, and further erred in holding that this intention of the testatrix (found by the court) that the separate heirs of the body of each, as well as the joint heirs of both, are to take, can be effectuated by an estate by the entirety for life in the first takers and several inheritances, since the intention of the testatrix is clear that the devise over to the trustees shall not take effect so long as there are heirs of the body of either, separate or joint, and as the separate heirs of the body of one cannot take by descent the separate inheritance of the other, this intent of the testatrix can only be effective by an estate by the entirety for the lives of the first takers and a remainder to the heirs of the body, whether separate or joint, of the first takers.

(8) The court erred in refusing to hold that the natural and plain meaning of the language employed by the testatrix is that an estate by the entirety having been created, at the decease of the survivor the entire estate would pass to the heirs of the body of either in case either left heirs of the body, whether heirs of the body of the survivor or not, an intent clearly incompatible with an intent to create an estate tail.

(9) The court erred in holding that the word "limited" in the codicil and the fact that the annuity is granted for life have no bearing on the construction of the devise in question.

(10) The court erred in holding that the presumption that a testator intended a legal estate rather than an illegal one has no bearing on the question, and in holding, without evidence, that "an impression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here," and in holding that there is in this case an unmistakable intent to create a fee tail.

(11) The court erred, while holding the cases of *Nahaolelua v. Heen* and *Boeynaems v. Ah Leong* to be rightly decided and reaffirming the ruling made therein that "when a futile attempt has been made to create an estate in fee tail it will take effect either as a fee simple or a life estate and remainder according to which appears to more nearly effect the intention of the grantor or testator," in holding that ordinarily such estate "will be held to take effect as

a fee simple unless something appears which should send it the other way."

(12) The court erred in holding that in the case at bar "there is nothing tending to show a preference for a life estate and remainder," since the will provides and the trial court found that the testatrix intended, at the death of the first takers, the heirs of the body of either to take an interest which they could not take by descent, and this even under the theory of the defendant, since upon the failure of the heirs of the body of one tenant in common, that interest would pass to the separate heirs of the body of the other by some form of remainder.

(13) The court erred in holding that it must affirmatively appear that in the particular case a life estate and remainder would more nearly comply with the ultimate disposition of the property and the direct benefits to be conferred thereby which the grantor or testator had in mind, or the devise will be held to take effect as a fee simple in the first taker, in that the same is inconsistent with the ruling of *Nahaoelua v. Heen* and *Bocynaems v. Ah Leong*, reaffirmed in this case, that the estate will be held to be one or the other "according to whether the one effect or the other will go merely towards carrying out the intention of the grantor or testator in each case."

(14) The court erred in holding that the principles of the common law should be applied to test the character of fee tail estates in Hawaii, and particularly in ignoring the fact that an estate in tail in

Hawaii could not be barred or conveyed by the first taker or that there are any provisions of the common law which would be in force under the law of Hawaii which would favor the first taker.

# THE HAWAIIAN LAW WHICH MUST GOVERN THE INTERPRETATION OF THIS WILL.

“\* \* \* in the year 1827 there was no fixed or uniform law of inheritance in the Kingdom, such as has existed here for the last twelve or fifteen years. At the same time, however, it seems abundantly clear that among the higher class of chiefs at least, the possession and use of lands usually descended from one set or generation of holders to another. That is to say, upon the death of a landholder the possession of his lands was not ordinarily resumed or appropriated by the King. The fact of a general transmission of the possession of lands seems well established, although such transmission was not governed by well defined rules or uniform custom.”

*L. Keelikolani v. James Robinson*, 2 Haw. 514, 542.

As John Ricord, the first distinguished lawyer of Hawaii and drafter of many of its early statutes, says in the preface of the Statute Laws of Kamehameha III, 1846:

“The bill of rights, proposed and signed by His Majesty on the 7th of June, 1839, was the first essential departure from the ancient despotism. The constitution which he voluntarily conferred on the peo-



ple on the 8th of October, A. D. 1840, recognizes the three grand divisions of a civilized monarchy, king, legislature and judges, and defined in some respects the general duties of each. These however, were so engrafted on the ancient form of government that there seemed to be a blending of their separate functions, requiring the aid of organic acts, limiting their usual spheres, in order to secure the civil liberties intended to be conferred upon the people. The constitution had not been carried into full effect. Its provisions needed assorting and arranging into appropriate families, and prescribed machinery to render them effective."

and again (page 5) :

"As results of missionary labor, however, the ordinances have been greatly serviceable in preparing the nation for what has since become indispensable to its political existence—a complete code of laws  
\* \* \*

The Bill of Rights, after declaring that :

"'God hath made of one blood all nations of men to dwell on the earth,' in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands."

declared that :

"Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to

the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws."

Thurston's Fundamental Law, p. 1.

The Constitution, in an "exposition of the principles on which the present dynasty is founded" recites:

"The origin of the present government, and system of polity, is as follows. KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey the smallest portion of land without the consent of the one who had, or has the direction of the kingdom."

Thurston's Fund. Law, p. 3.

The Act creating the Board of Commissioners to quiet land titles, passed December 10, 1845, was based quite largely on similar provisions by the Congress of the United States, one of which settled the constitutional land grants in California, provided (Sec. 7) that if claims were not presented they should be forever barred, and by Section 13, that titles awarded should be deemed forever settled.

Thurston's Fund. Law, 138.

In the principles adopted by the board which had

the force of law, the history of land tenures is recited showing as a result that the King really owned the allodium and always had the right of its possession until the Declaration of Rights and the Constitution. The King voluntarily relinquished his rights and interposed in the commission his power to confer and convey land as a private and fiduciary right which are now held "by a tenancy incomprehensible to the foreigner," and being desirous to conform in the main to a civilized state of things.

Thurston's Fund. Law, 140, 154.

"The real foundation of settled titles seems to have been the establishment of the Land Commission in 1845."

*Thurston v. Bishop*, 7 Haw. 421, 428.

*Lewers & Cooke v. Atcherley*, 222 U. S. 285.

The judicial history of Hawaii which begins with the Constitution of 1840 is one of which she is proud. It extends back farther than that of any state west of the Mississippi except Louisiana, Missouri, Arkansas and Iowa, and its early thought was dominated by Christian missionaries who had implanted their high ideals in its laws, its justice, its human relations, into the very life of that nation. In the Third Act of Kamehameha III, 1847, reorganizing the judiciary department, it was provided that

"The reasonings and analogies of the common law and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed

to be founded in justice, and not at conflict with the laws and usages of this kingdom. The principles sustained by said courts when sanctioned by the supreme court, shall become incorporated with the common law of the Hawaiian Islands, and shall form an essential ingredient in the civil code: Provided always, that the legislative Council of Nobles and Representatives, may by act sanctioned by His Majesty, and duly promulgated, correct, alter, or abrogate the principles of such abstract judgments and decisions, in analogous cases afterwards to arise before said courts, or any of them."

and this in substance was incorporated into the Civil Code,

"Sec. 14. The Judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries."

"Sec. 823. The several courts may cite and adopt the reasonings and principles of the admiralty, maritime, and common law of other countries, and also of the Roman or civil law, so far as the same may be founded in justice, and not in conflict with the laws and customs of this Kingdom."



It was not till long after the death of Mrs. Bishop "that the common law of England as ascertained by English and American decisions" was declared to be the common law of the Territory of Hawaii "except as otherwise expressly provided by the constitution or laws of the United States or by the laws of the Territory of Hawaii or fixed by Hawaiian judicial precedent or established by Hawaiian usage." (Act Nov. 25, 1892; took effect Jan. 1, 1893.) R. L. Haw. 1915, Sec. 1.

### *THE DECISION OF THE COURT.*

The Circuit Court and the Supreme Court both held that the Testatrix did not intend to create a fee simple in the first takers (Tr., pp. 32, 33, 34, 46); that the devise created an estate by the entirety in them (Tr., pp. 32, 48); that she did not intend that their heirs general should take (Tr., pp. 32, 46), but that the words "heirs of the body" must receive their technical meaning as words of limitation, importing inheritance, unless from subsequent inconsistent words it is made perfectly plain that the testator meant otherwise (Tr., p. 47). That the use of the words "of either," although clearly showing an intention that the heirs of either spouse by another would take, are not sufficient to show that Kahakua-koi and Kealohapauole took a life estate, the court saying:

"The word 'either' does not refer to the first takers or necessarily affect the estate devised to them. It

relates only to the inheritance. There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances. 2 Jarman on Wills (6th ed.), 267; Ex parte Tanner, 20 Beav. 374, 52 Eng. Rep. 647; *Doe v. Green*, 4 M. & W. 229, 150 Eng. Rep. 1414. And we see no reason why the principle should not apply in the case of an estate by the entirety in tail. It is really of no practical importance in this case whether the first takers be regarded as having been tenants by the entirety, joint tenants or tenants in common, and as this case does not involve a controversy between two different sets of heirs of the first takers it is a matter of academic interest only as to how the heirs of one spouse who were not also heirs of the other, had there been such, would have taken. We think, however, that the contention of counsel for the defendant in error that without the words 'or either' the descent would have been limited to the heirs of the joint bodies of the first takers, thus creating an estate tail special, and that that word was used to express the intention to create an estate tail general is sound. Under this theory the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse. It is to be noted, in this connection, that in the clause in question no words of separation or futurity were used to draw a line of demarcation between the estate of the first takers and that of the heirs. The devise over to the trustees upon default of issue does not militate against the theory of any estate of in-

heritance. It is not only feasible to limit a remainder after an estate tail upon failure of issue, but, in order to complete the testamentary disposition, is the natural thing for a testator to do."

In order to determine exactly what the court means by this, it is necessary to analyze the opinion and in so doing, to anticipate a portion of the argument, thus, the portion of the excerpt down to *Doe v. Green*, apparently says four things:

1. "The word 'either' does not refer to the first takers."
2. Does not "necessarily affect the estate devised to them."
3. "It relates only to the inheritance."
4. "There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances."

When, however, we examine the citations, we find by the reference to 2 Jar.\* 252, that the estate which is created is not "a joint estate in fee tail \* \* \* with several inheritances," but that "the devisees are *joint tenants for life*, with several inheritances in tail," or as Underhill puts it, a devise to A and B and the heirs of their bodies where A and B are not husband and wife and cannot become such,

"In such case they are joint tenants for life, but tenants in common by necessity in respect to the estate tail." (2 Underhill Wills, Sec. 536.)

while in *Ex parte Tanner*, the words used in a like case were "the heirs of their respective bodies lawfully issuing" and the Master of the Rolls, Sir John Romily, citing Littleton's Tenures, s. 283, to the general rule, held that he

"must confine the application of the word 'respective' to the inheritance given after the estate to the children. If the devise had been to the children and the heirs of their bodies respectively, I should have held them *tenants in common in tail*. Here the expression 'respective' is limited to the inheritance, and these are fit words to create a joint estate *for life*, with several estates of inheritance in tail."

While in *Doe v. Green* the devise was to two nieces "equally between them to take as joint tenants and their several and respective heirs and assigns forever," and the court said:

"But we are of opinion that due effect may be given to all the words in this devise, by deciding that the devisees, the nieces, *took an estate for their joint lives and the life of the survivor, that is, as joint tenants with remainder to each of them as tenants in common* in fee after the death of the surviving life; in other words, that they took as tenants in common in fee, subject to an estate for their joint lives, and the life of the survivor."

*Doe v. Green*, 4 M. & W. 229, 150 E. R. 1414,  
1419.

The result is that instead of a joint estate in fee



tail with several inheritances, the devise claimed, if the case relied on by the court apply, would constitute Ka. and Ke. "joint tenants with a remainder to each of them as tenants in common after the death of the surviving life." In other words, (4) must be restated as follows: "There is no legal obstacle to the creation of a joint estate *for life with a remainder* to the joint tenants for life as tenants in common, either in fee tail or fee simple."

Again, these cases show that the word "either" does refer to the first takers and necessarily affects the estate devised to them and does not relate only to the inheritance, since these words change what would be an estate in fee tail or fee simple into an estate for life with remainder in fee tail or fee simple.

The rest of the citation contains five additional propositions.

(5) There is no legal obstacle to the creation of an estate by the entirety in tail with several inheritances.

(6) It is not necessary to consider whether the first takers were tenants by the entirety, joint tenants, or tenants in common, and as there is no controversy between different sets of heirs "it is a matter of academic interest only as to how the heirs of one spouse, who are not heirs of the other, had there been such, would have taken."

(7) The words "or either" change what would have been an estate tail special into an estate tail general.

(8) No words of separation or futurity between the estate of the first takers, and that of the heirs.

(9) The devise over to the trustees in default of issue does not militate against the theory of an estate of inheritance.

We will show in the argument that (5) is not supported and is inconsistent with the authorities.

As to (6), it is elementary that what might happen under the devise as well as what did happen, must be considered in order to get at the mind of the testator.

Judge Frear has well said on this point:

“In order to solve these questions it is necessary to consider not merely the circumstances as they happen, but circumstances that might have happened and to construe the will placing themselves in the position of the testator who presumably intended to provide for such contingencies as might happen but could not foresee just what in particular would happen.”

*Rooke v. Queen's Hospital*, 12 Haw. 375, 379.

We have already shown that as to (7) the words “of either,” according to the decision of the court, do not change an estate tail special into an estate tail general; but change the devise to the first takers into a devise by the entirety for life, and then segregate the remainder into tenancies in severalty each in fee tail general.

As to (8) there are “words of demarcation” which

import futurity in this devise not found in the devisees in fee simple elsewhere, in the will, namely, the words "and to."

And as to (9) the court by converting the estate into a fee simple, necessarily convert the remainder to the trustees, which they say "is a natural thing" into an executory devise, which is not natural, for courts will always construe a devise as a remainder rather than an executory devise.

The Supreme Court gave no weight to the surrounding circumstances to which the court below ascribed importance, particularly their dependence upon the testatrix's bounty for home and subsistence when the will was made, and the relationship between her and the first takers and the children of the first takers. It was further held that the provision giving power to the devisees for life to make leases good for ten years, tends to show that a life interest was not given (Tr., p. 51).

Notwithstanding the declaration in the *Rooke* case, in the opinion by Judge Frear, the learned counsel for the defendant in this case, that "we find no instance of the recognition of the estates tail or of their concomitants, such as fines and common recoveries, in the history of these Islands (*Rooke v. Queen's Hospital*, 12 Haw. 365, 391), reaffirmed in the *Nahaolelua v. Heen*, 20 Haw. 372, and in *Boeynaems v. Ah Leong*, 21 Haw. 699, in which latter decision the writer of this opinion joined, the court below says in regard to the presumption that the

testator intended a legal estate, rather than an illegal one:

“The presumption does not operate with much force in the case at bar since an impression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here, and there was no reported ruling to the contrary till the case of *Rooke v. Queen’s Hospital* was decided in 1900. In a jurisdiction where fees tail have been abolished, the courts would be slow to construe a will executed after the abolition as intending to create such an estate. Such an intention would not be implied.”

Reaffirming *Nahaolelua v. Heen*, 20 Haw. 372, and *Boeynaems v. Ah Leong*, 21 Haw. 699, the court goes further and holds that a deed or devise to A and the heirs of his body “ordinarily will be held to take effect as a fee simple unless something appears which should send it the other way,” and that in this case there is nothing tending to show a preference for a life estate and a remainder (Tr., pp. 55, 56, 57) and the fee tail should be declared to be a fee simple

“because both are estates of inheritance and belong to the same genus; both, at common law, were subject to the incidents of dower and curtesy, and were without impeachment of waste; the tenant in tail could bar the entail; an estate tail, in point of law, bears little resemblance to a life estate and remainder; and the law generally favors the first taker. In



short, in such a case as this, a holding that the first taker shall have an estate in fee simple will go as near as may be under the law toward effectuating the futile intent to create an estate tail." (Tr., p. 57.)

## *ARGUMENT.*

### I.

THE DECISION OF THE COURT BELOW IS ERRONEOUS, BECAUSE IT CONSTRUES BY AN ARTIFICIAL AND TECHNICAL COURSE OF REASONING, THE PROVISION WHICH THE TESTATRIX INTENDED TO MAKE, AS AN INVALID GIFT, WHICH IT PROCEEDS TO CONVERT INTO AN ENTIRELY DIFFERENT VALID GIFT, WHICH THE TESTATRIX DID NOT INTEND TO MAKE.

It construes the provision in the will of a typical Hawaiian as creating an estate which was never a part of its system of law; is repugnant to its policy of the free alienation of property; was never recognized in the history of the Islands, and which conflicts in important respects with its statutory law, although the devise can easily be construed as a legal devise providing for the beneficiaries who were in the mind of the testatrix.

We have shown that the court's construction of the immediate devise is identical with our own, that Kahakuakoi and Kealohapauole took under it a life estate by the entirety, but instead of construing the reversionary estate as being what the will says "to

the heirs of the body of either, \* \* \* upon default of issue, the same to go to my trustees," a valid devise which provides for the three classes which the testatrix had in mind, namely, the parents, the heirs of the body of either, and the trustees, the court applied technical rules of the common law, not in force in Hawaii, and assumes that the testatrix intended a remainder in the dead husband and dead wife, in the form of a tenancy in common in tail, a void estate which has no place under the law of Hawaii; was never a part of its system or imported into these Islands; which is abhorrent to the general movement of thought in regard to land titles; repugnant to the Hawaiian policy of free alienation; was never recognized in the history of the Islands and conflicts with its statutes (*Rooke v. Queen's Hospital*, 12 Haw. 375, 391), and this estate implied by the court would have as its concomitants, curtesy and dower in persons not contemplated by the will as recipients of the testatrix's bounty, viz: the husband or wife of the survivor, would necessitate remainders in tail in the respective heirs of the body of Kahakuakoi and Kealohapauole on the failure of heirs of the body of the other, and would also necessitate the conversion of the estate tail into a valid estate and of the contingent remainder to the trustees, which would then arise on an indefinite failure of issue, into an executory devise.

(a) *Where a devise is susceptible of two reasonable constructions one of which is in contravention*

*of law, statutory or general, and the other not, the latter will be preferred, if possible without doing violence to the testator's purpose.*

The courts have often laid down this rule in cases where the statute against perpetuities was involved.

“In determining these unadjudicated questions we do not feel at liberty to be unmindful of the statute against perpetuities, and the construction which as the result of repeated decisions is now given to it. While bound to thus recognize the statute in arriving at our independent conclusions, we are also required to apply to the construction of the testator's testamentary provisions the presumption that they were not violative of the law, and to construe them in the light of that presumption, so that if his language is susceptible of two reasonable constructions, one of which is in contravention of the law, and the other not, the latter will be preferred.”

*Farnam v. Farnam*, 83 Conn. 369, 77 Atl. 70, 74.

“Where one proposed construction of an ambiguous provision assumes an intention to make an unlawful gift, while another does not, the latter will be accepted, if possible, without doing violence to the testator's purpose.”

*Porter v. Union Trust Co.*, 182 Ind. 637, 108 N.E. 117.

“When by an artificial and technical course of reasoning the invalid gift which the testator intended to make is converted into an entirely different valid gift which the testator did not intend to make, the result is a very gross injustice and a violation of the rights involved in the testamentary disposition of property.”

*Hewitt v. Green*, 77 N. J. E. 345, 77 Atl. 25, 28.

“If two constructions may be put upon a provision in a will, one of which will violate an inflexible rule of law and the other not, the construction which will not offend the rule is to be adopted by the court. 1 Perry on Trusts, 381; *Martelli v. Holloway*, L. R. 5 H. L. 532.”

*Towle v. Doe*, 97 Me. 427, 54 Atl. 1072, 1074, 1075.

“All the authorities agree that in ascertaining the intention of the testator all the provisions of his will should be examined, so as to ascertain his general purpose, and unless the plain import of the words demands otherwise they should be so construed as to be consistent, each one with all the others and not *in violation of law, statutory or general*.” (Mr. Justice Harlan.)

*M’Graw v. M’Graw*, 176 Fed. 312, 319.

“It is always assumed, as a rule of construction, that the testator knew the law, and we are also to assume that he desired to make legal and effectual disposition of his property. If therefore the language used by him is capable of a reading consistent



with the law, it is our plain and imperative duty to give it that reading."

*Du Bois v. Ray*, 35 N. Y. 162, 171.

So under a will which could be construed as providing for an ultravires gift to the beneficiary, Mr. Justice Holmes says:

"But, furthermore, we are not to construe the will as imposing a condition which is contrary to law, unless the language plainly has that meaning. *We are not to assume without necessity that the testator either was ignorant of pretty obvious law, or defied it in shaping the conditions of a scheme which he was anxious to have carried out.*"

*Quincy v. Attorney General*, 160 Mass. 431, 35 N. E. 1066, 1068.

(b) *This rule has been applied by the courts in holding that a devise should not be held to create an estate in fee tail where such an estate is not valid.*

Thus in Illinois a devise to A and his heirs forever with a further proviso that should he die "without heirs of his body" the estate should go to his surviving brothers and sisters, the court held that the devise was plainly of a fee determinable upon his dying without heirs of his body, but the court continued:

"There is, moreover, in our opinion, a reason sustaining this view in this state which does not exist

where, as at common law, estates tail are recognized. We have no estates tail ; but, on the contrary, where an instrument is executed which would at common law be held as vesting an estate tail, our statute declares it shall only vest a life-estate in the grantee or donee in tail, and the remainder in fee in the designated heir or heirs. Section 6, c. 30, Rev. St. 1874. *It would then seem that it violates the plainest principles of construction to hold that language in a will which can only rest a life estate in the first taker, and a remainder in fee in the next, was intended to vest an estate tail, merely because, if that language had been employed where estates tail are recognized, it would have vested such an estate. It does not have that effect here, and, in the absence of anything appearing to the contrary, language must be presumed to have been intended to have the legal effect which the law assigns to it."*

*Summers et al v. Smith et ux.*, 127 Ill. 645, 21 N. E. 191, 192.

In a Georgia case where a similar question was involved, it is said :

"The question is whether he intended to create an estate tail, which is prohibited by the law of Georgia, or an estate in remainder, which is legal. Even if there be any doubt, shall this court construe those words so as to attribute to the testator the intention of doing a forbidden thing, and therefore by legal effect accomplishing a result which would have been

reached without the use of the words above quoted at all?"

*Cooper v. Mitchell Investment Co.*, 133 Ga. 769, 66 S. E. 1090.

"Estates tail are lawful in Great Britain, and the word *heirs*, *heirs of the body*, etc., have a fixed technical meaning; and, therefore, when, in that country, such words are used in an instrument of conveyance, presumptions may favor these estates. But such estates are prohibited in Georgia—these words are, by legislation, as it were, deprived of that settled signification; and therefore, presumption will not here, readily favor such estates."

*Robert v. West*, 15 Ga. 122, 145.

"We cannot therefore by construction turn a life estate into an estate tail, and then give it up to the operation of the act of 1784, and thereby entirely defeat the intention of the devisor."

*Jarvis v. Wyatt*, 11 N. C. 227.

So the Texas court said:

"In the states that have inhibited entailment, the words 'heirs of the body' are not strictly technical, because they are not appropriate words to create any estate recognized by law. *Jarvis v. Wyatt*, 4 Hawks, N. C. 227. In this state it is not even necessary to use the words 'Heirs' to create an estate in fee."

and in reference to whether the words "lawful issue" should be presumed to be words of limitation and not

of purchase, the same court further said such presumption

“is to make the donor do that which is in violation of law, in making an estate tail (which will not readily be presumed. See 15 Ga. 145-6.)”

*Hancock v. Butler*, 21 Tex. 804, 811, 817.

In Kentucky, the court said of a devise to “J. W. and to the heirs of her body by I. W.”,

“Estates tail are forbidden by our law, and hence, although the language appears to create such an estate, yet if any other construction will not necessarily distort the meaning of the words used, it will be adopted.”

*Brown v. Elzey*, 83 Ky. 440, 443.

The court held that “heirs of her body by I. W.” meant children who therefore took in *praesenti* with their mother.

(c) *The rule should be applied even more rigorously to the will of a Hawaiian, who was the last of the Kamehamehas.*

We submit to the court in this case a very serious error on this point. While admitting that “In a jurisdiction where fees tail have been abolished the courts would be slow to construe a will executed after the abolition as intending to create such an estate,” it is said that this presumption “does not operate with much force in the case at bar since an im-



pression seems formerly to have existed—how prevalent it was we do not know—that fees tail could exist here.” Against this statement of an alleged impression, of which the court does not seem any too sure; of which there is no evidence in the record, of which we can find no recognition in the judicial history of Hawaii, we place the language in the Rooke case of the leading counsel for the defendant in an opinion concurred in by at least one Judge who was in the full tide of practice in Hawaii when the will was written, and we strenuously urge that the opinions of judges who practiced at the bar of Hawaii before the common law was adopted, are of more value than those who had not that experience.

“We have no hesitation in holding that estates tail have no place under the laws of Hawaii. It is true, as contended, that ancient Hawaiian land tenures bore a striking resemblance to those which prevailed in Europe in feudal times. A feudal system, not the feudal system of early English history, grew up in these Islands. Estates tail were never a part of that system. Even in England they were of statutory origin. Nor was the English system ever imported into these Islands. On the contrary the movement was in the opposite direction, as shown, among other things, by the establishment of the Land Commission in 1846 for the purpose of awarding titles in fee simple and abolishing what then remained of the Hawaiian feudal system. Estates tail are repugnant to the policy of the free alienation of

property and have generally been considered out of place in the United States and have been abolished by statute or not recognized by the courts in most of the States and our early settlers from New England, here one remove further from old England, would not have been likely to introduce estates tail even if they had brought with them the main body of their laws and customs and established a colony of their own, instead of becoming themselves practically incorporated in the Hawaiian nation and merely exercised an influence, important though it was, upon Hawaiian legislation, customs and ideas. Accordingly, we find no instance of the recognition of estates tail or of their concomitants, such as fines and common recoveries, in the history of these Islands. On the contrary, as pointed out by counsel, statutes have been enacted, which in important respects conflict with the idea of the existence of estates tail. For instance, the disposition of property at death is provided for as follows: 'Every person of the age of eighteen years and of sound mind may dispose of his or her estate both real and personal by will.' Civ. L., Sec. 2122. The owner of an estate tail could dispose of it by will under this statute. But at common law estates tail could not be disposed of by will. 'Whenever any person shall die intestate within this Republic, his property, both real and personal, of every kind and description, shall descend to and be divided among his heirs as hereinafter prescribed.' Civ. L., Sec. 2105. Upon the decease of the owner of an estate tail intestate it would go to his heirs

general under this statute. But it is of the very essence of an estate tail that it shall go to heirs special. An estate tail is an estate from which the heirs general and the power of alienation are tailed or cut off. In the case of an estate tail, the issue take, if at all, by descent, and not under the will of the creator of the estate, and if they take by descent they must take under the statute of descent, and a testator cannot by attempting to create an estate tail, alter the statute of descent by prescribing a course of descent inconsistent with that prescribed by the statute. In the case of an estate tail general, it is true, the heirs special, that is, the heirs of the body, if any, would, under our statutes, be the heirs general, and the estate would descend here as at common law so long as it lasted, that is, so long as such heirs lasted, to the heirs general, although such heirs would not be the same persons or take in the same manner here as at common law, where males were preferred to females, and the eldest male and his male descendants to the younger males, and all descendants, who took at all, took *per stirpes*, though of the same degree; and upon the failure of such heirs, that is, upon the termination of the estate, there would be nothing to go to the heirs general, that is, the collateral heirs or lineal ascendants. But in most cases of estates tail male or female or special, the heirs special would not be the heirs general and the course of descent indicated by the will would conflict with that prescribed by the statute. Under

similar statutory provisions it was held that estates tail could not be created in New Hampshire. *Jewell v. Warner*, 35 N. H. 176."

*Rooke v. Queen's Hospital*, ubi supra.

Again the same learned judge in holding that the common law rule requiring the use of heirs in a deed was not a law in Hawaii before the adoption of the common law rule, says:

"That rule was a relic of the feudal system and grew up under conditions that no longer exist in England and never existed in these Islands as it did in England. It is now regarded as purely technical, and its chief effect seems to be to defeat the intention of the parties."

and after referring to the rule of construing ancient conveyances by the courts of Massachusetts, without regard to this rule of the common law, he cites *Cole v. Lake Co.*, 54 N. H. 242:

"They who brought the general body of the common law with them to this region might well have omitted to bring the feudal rule, not because it was fabricated in a barbaric age, but because it was designed and fitted to perpetuate a barbaric condition; not because it originated in a foreign land, but because it was not suited to the commonwealth which our foreign ancestors came to this country to organize."

and then adds:



“The New Englanders who early settled here did not come as a colony or take possession of these Islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted, until 1893, and then subject to judicial precedents and Hawaiian national usage. Prior to that time the courts were at first without statutory suggestion as to what law they should follow in the absence of statutes, and later were expressly permitted by statute to appeal to ‘natural law and reason, or to received usage, and \* \* \* the laws and usages of other countries’ and ‘to adopt the reasonings and principles of the admiralty, maritime, and common law of other countries, and also of the Roman or civil law, so far as \* \* \* founded in justice, and not in conflict with the laws and customs’ of this country. See Civ. Code, Secs. 14, 823. The courts usually followed the common law when applicable. But they felt free to reject it, and did as a rule when, as in the present case, it was based on conditions that no longer exist, and when it had come to be generally recognized as merely technical and subversive of justice or the intentions of the parties to instruments and when it had in consequence been generally altered or abrogated by statute elsewhere. The question here, unlike that in the United States, was not whether the court should decline to follow a rule, but whether it should adopt a rule. The reason for giv-

ing effect to the clear expressed intention and for not adopting technical rules, especially when they are practically obsolete and founded on conditions that never existed here, is greater in the case of Hawaiians and Hawaiian deeds than in the case of English-speaking people and English deeds. See *Haalelea v. Montgomery*, 2 Haw. 62; *Kekuke v. Keliiaa*, 5 Ib. 437. Among the cases in which the court has declined to follow the common law as to real property the following may be mentioned: *Wood v. Ladd*, 1 Ib. 17, seal not essential to a mortgage; *Campvrell v. Manu*, 4 Ib. 459, seal not essential to a deed; (see also *In re Congdon*, 6 Ib. 633, seal not essential to a bond); *In the matter of Vida*, 1 Ib. 63, dower in leasehold estate of long duration; *Kuuku v. Kawainui*, 4 Ib. 515; *Puukaiakea v. Hiaa*, 5 Ib. 484, and *Kuuku v. Kawainui*, 4 Ib. 515, conveyance of freehold *in futuro*; (see also *Judd v. Hooper*, 1 Ib. 13, livery of seisin); *Awa v. Horner*, 5 Ib. 543, deed to two or more creates tenancy in common; *Thurston v. Allen*, 8 Ib. 392, same as to tenancy in common, also *Rule in Shelley's Case* not law here; *In re Keliiahonui*, 9 Ib. 6; *Mossman v. Government*, 10 Ib. 421, and *Ninia v. Wilder*, 12 Ib. 104, conveyance by disseissee valid; *Rooke v. Queen's Hospital*, 12 Ib. 374, estates tail and fees simple conditional cannot exist here. See also *Kake v. Horton*, 2 Ib. 209, damages for death by wrongful act; (see also *Puuku v. Kaleleku*, 8 Ib. 80); also *The King v. Agnee*, 3 Ib. 106, and *The King v. Robertson*, 6 Ib. 718, practice in criminal cases."

*Branca v. Makuakane*, 13 Haw. 499, 504.

If then "where fee tails have been abolished the courts would be slow to construe a will executed after the abolition as intending to create such an estate" and "such an intention would not be implied," ought not the presumption to operate with much more force in the case at bar where the court is construing the will of the last of the Kamehamehas, a typical Hawaiian, and not impute to her a knowledge of that feudal system which was never a part of the Hawaiian and an intention to create an estate "repugnant to the policy" of Hawaii, of which there is "no instance of the recognition in the history of these Islands; and which conflicts with its early statutes? We submit that the supposition of the court is incredible, that Bernice Pauahi Bishop's intent was to create an estate of which she knew nothing, of which there has been no instance in the Islands, which was foreign to her ideas, with all the technical concomitants which the necessities of the English feudatory system had surrounded it. Even in the case of Doctor Rooke, who was an Englishman, and who undoubtedly knew of the estate, where the court held that the devise would create an estate tail at common law, the court did not impute to him such an intent.

## II.

AT COMMON LAW THE DEVISE WOULD CREATE AN ESTATE BY THE ENTIRETY FOR LIFE IN THE FIRST TAKERS, WITH ALTER-

NATE CONTINGENT REMAINDERS AT THE TERMINATION OF THE LIFE ESTATE IN THE THEN SURVIVING HEIRS OF THE BODY OF EITHER OR IN THE TRUSTEES, AS THE CASE MIGHT BE.

(a) *The decision necessarily holds that an estate by the entirety for life was created in Kahakuakoi (w) and Kealohapauole (k).*

This is the necessary result from the cases cited by the court. The decision, after declaring that "the first takers being husband and wife, presumably took by the entirety: *Robinson v. Ahcong*, 13 Haw. 196," cites 2 Jar. on Wills, 252, *Ex parte Tanner*, and *Doe v. Green*, to the point that the joint estate in fee tail or fee simple may have several inheritances, and then sees no reason why it should not be applied to an estate in the entirety. But as we have already shown, Jarman and the cases cited show that the estate as construed by the court is a joint estate for life in the first takers with a remainder. The estate by the entirety declared to have been created here is then an estate by the entirety for life, with a remainder.

(b) *There is reason why a remainder in severalty should not be implied where a husband and wife take an estate by entirety for life.*

1. No such remainder has ever been recognized in the innumerable cases before the English court. In *Ex parte Tanner*, it is said:



“If lands were given to a man and woman, and the heirs of their bodies, this would be an estate in special tail (Littleton’s Tenures, S. 16), and the word ‘respective,’ if introduced before the word ‘heirs,’ would have the effect of making the man and woman *joint tenants for life*.”

continuing:

“I must confine the application of the word ‘respective’ to the inheritance given after the estate to the children. If the devise had been to the children and the heirs of their bodies respectively, I should have held them *tenants in common in tail*. Here the expression ‘respective’ is limited to the inheritance, and these are fit words to create a joint estate *for life*, with several estates of inheritance in tail.”

Ex parte Tanner, *ubi supra*.

So also the cases cited in Elphinstone on Interpretation of Deeds, page 235, would indicate that except where both take an estate tail, as in *Denn v. Gillot*, 2 T. R. 431, the husband and wife do not take an estate by the entirety.

2. The tenure of an estate in the entirety is quite different from a joint estate, and still more so from a tenancy in common. The husband and wife are seized *per tout* but not *per my*. Each joint tenant can alien his interest; a tenant by the entirety cannot. The former can sever their estates, the latter is inseverable. The former can have partition, but

not the latter; and it is questionable whether divorce proceedings affect it.

“The estate of joint tenants is a unit made of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case, there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased co-tenant. In the last case, though there are two natural persons, they are but one person in law, and upon the death of either, the survivor takes no new estate. It is a mere change in the legal properties of the person holding, and not an alteration in the estate holden.”

*Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 399, 18 Am. Dec. 378.

*Den v. Hardenbergh*, 18 Am. Dec. 378 (Note).

So the abolition of tenancies in common does not affect the estate by the entirety. They are not repugnant to the genius of the republic. (Id. 380.)

“a grant to husband and wife was not considered in the same light as a grant to other persons; for that if a joint estate be made to husband and wife, and a third person, the husband and wife have but one moiety; and the third person will have as much as them both; because the husband and wife are but one person in law.”

Co. Lit. 107, Fearne, p. 40.

Again Mr. Fearne observes that a limitation to the

heirs of their bodies following a joint limitation to husband and wife must be of the same quality, that is, a joint limitation.

Fearne, p. 37.

The limitation in this devise is clearly not joint, and therefore, must be a remainder and not a limitation of the precedent estate. Aside from this, it is inconceivable that there should be a separate interest in either tenant by the entirety during the existence of that estate. Such an interest would be directly opposed to the theory of seizin, which is *per tout*. On the other hand, there is nothing inconsistent with there being a contingent remainder in the heirs of the body of either at the termination of the estate by the entirety for life. The former interest is a vested interest; the latter interest is a contingent interest and therefore not inconsistent with the common law theory of an estate by the entirety.

(c) *That Kahakuakoi (w) and Kealohapauole (k) took for life only, and that the testatrix intended to devise the remainder to those persons then living, who should be of the blood of both, or either by another; in default of such issue to the trustees, is strongly indicated by a careful analysis of the several provisions of the two clauses.*

1. By her provision in the same clause "unto Kahakuakoi (w) and Kealohapauole, her husband, and

to the survivor of *them*" of an annuity "so long as *either* of them may live."

2. The devise is "unto *them*," viz: unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of *them* \* \* \* so long as *either* of *them* may live.

3. The remainder is devised "and to the heirs of the body of *either*," and while the words "and to" are not decisive, they are often words of demarcation indicating a devise over, and this is so recognized by Judge Frear in the Rooke case. Their importance is accentuated by an examination of the will. In every case in which the testatrix gives the whole estate, she says, as in Clause 13, "*unto* the trustees below named, their heirs and assigns forever." Clause 16, her personal property to her husband, "*to* him, his executors, administrators and assigns forever," and First Codicil, Clause 9, of Moanalua to S. M. Damon, "*to* him, his heirs and assigns forever," in no case using the words "and to" before the words heirs or executors, while in the will she uses the word "*to*" as meaning "devise to" the trustees, fifteen times. Their importance is further emphasized by use elsewhere in the clause; the devise to the first takers is "*unto* *them*"; to the trustees "*to* my trustees." Is it not reasonable to suppose that "*to* the heirs of the body of *either*" had the same force in the mind of the testatrix?

4. The words of the Codicil (Tr., p. 87) "to have and to hold as limited in said fifth article of my said will" adds some force to this. The limitation in



terms refers to the entire fifth article. Again there is no devise to Kahakuakoi and Kealohapauole specifically, as expressed in the codicil in the will; it is "unto them," and the "them" referred to is to be found by reference to the recipients of the annuity, which is given "so long as *either* of them may live." When there is added the fact that it is conceded that the immediate devise is of a life estate to Kahakuakoi and Kealohapauole by the entirety, that is to say, "so long as *either* of them may live," the most reasonable supposition is that the limitation referred to is the devise over "to the heirs of the body of *either*" and "upon default of issue the same to go to my trustees."

(d) *This conclusion is made clear by the words of explanation "of either," and the devise "upon default of issue" to the trustees.*

The decision holds that these words indicate that the heirs of the body of one spouse by another, who would, therefore, not be the heirs of the body of the other, would take "upon default of issue" clearly means, and this is not questioned by the courts, a default of issue of *either*, at the termination of the precedent estate. Whether the words be construed as words of purchase or of limitation, the succession prescribed by the will is to the heirs of the body of *either*, that is to say, the heirs of either or both, which includes the children of either spouse by another. Therefore, the succession, whether by pur-

chase or by limitation at the death of the survivor of the entirety would be as follows:

“1. The survivor leaving heirs of his or her body, the deceased spouse having left none, the heirs of the body of the survivor take.

“2. Both Ka. and Ke. leaving heirs of the body, the heirs of the body of both take, not the heirs of the body of the survivor.

“3. The survivor leaving no heirs of the body, the deceased spouse having left heirs of the body then surviving, the latter take.”

If the right of heirs of the body vests at the death of the predeceasing spouse, as the court holds, then heirs of the body of the predeceasing spouse, dying before the surviving spouse, their heirs or devisees, would take an interest, the whole in case the survivor left no heirs of the body, a share in case the survivor left heirs of the body, but such is not our construction of the clause.

Certainly (2) and (3) present a difficulty. The decision meets this by saying that there can be an estate by the entirety with several inheritances. There is no authority for this in the books, and the authorities which are cited do not sustain this proposition, but hold that where the devise is to the *respective* heirs of their bodies after a devise to joint tenants for life, in cases where the devisees for life are not and cannot become husband and wife, the remainder will be construed to be a tenancy in common in tail in the first takers, subject to the joint estate

for life. (Jar. on Wills, Vol. 2,\* 252; *Doe v. Green*, ubi supra; Ex parte Tanner.) Ex parte Tanner, in a dictum, goes a little farther and refers to Littleton's Tenures, s. 16, as authority for the proposition that the same result would happen where the devise was to the husband and wife and their *respective* heirs of their bodies, which approaches more nearly to this case, but seems to have been overlooked by the court. The difficulty in applying these cases is, that the word used here is not "their respective" but "of either." It is easy to see how the court fell into error. The former words do "not refer to the first takers," although they may "affect the estate devised to them" and may relate "only to the inheritance" (Tr., p. 56). The words "of either" clearly refer to the first taker, affect the estate devised to them if they take the estate the decision calls for, and do not relate only to the inheritance. Again, their position is significant; it is not "either's heirs of the body," but the "heirs of the body of either." Still more decisive is the reason that "respective" and "respectively" are

"Words of severance. Occurring in a testamentary gift to more persons than one, their effect is to sort out the devisees or legatees so that they take as tenants in common."

Bouvier's Law Dictionary.

While "either" is not a term of severance, but is sometimes used collectively and sometimes distributively,

The Illinois court said:

“The word ‘either’ is sometimes used in the sense of one *or* the other of several things, and sometimes in the sense of one *and* the other. Its use in this last sense is not infrequent. Thus it is common to say on either hand, or either side, meaning, thereby, on each hand or side.”

And held that on either side meant on both sides of a right of way.

*Chidester v. S. & I. S. E. R. W. Co.*, 59 Ill. 87, 89.

Where a paving ordinance contained the following clause: “Said curbstone to be set on either side of the roadway,” the same court said:

“In Webster’s definition of the word ‘either’ will be found the following: ‘2. Each of two; the one and the other.’ Under this definition, the language of the ordinance, ‘said curbstones to be set on either side of the road-way,’ would require them to be set on both sides. Indeed, the language used in the first part of the section, requiring the roadway 60 feet on the north to be curbed, shows plainly enough that it was intended by the provisions of the ordinance that both sides of the roadway should be curbed.”

*C. & N. P. R. Co. v. Chicago*, 172 Ill. 66, 49 N. E. 1006.

and again:

“In Sec. 155 of the practice act of 1903 (Mott, p. 79), the provision for reserving the right to trial by



jury is permissive in *either* party, and obviously means that *both* parties may make such reservation."

*T. Harrington's Sons Co. v. U. S. Express Co.*,  
87 N. J. L. 154, 93 Atl. 697.

Our own court has recently held that:

"The word 'either' is sometimes used in the sense of 'any.' 14 Cyc. 1232 (citing authorities). It was used in the sense of any of three in the second paragraph of this very will in the sentence 'if either of said daughters shall then be dead.'"

*King v. Hawaiian Trust Co., Ltd.*, 21 Haw.  
619, 622.

The difference between "either" and "respective" is illustrated by the reference in *Doe v. Green*, to *II Coke on Littleton*, Sec. 283, where in the case of lands given to two men "and to the heirs of their two bodies begotten" the court say that of necessity this must mean "their *several* and *respective* heirs of their body."

Not only does a devise to A and to the heirs of the body of A and B constitute a life estate and contingent remainders (*Denn v. Gillot*, ubi supra), but where the devise is to A and to the common heirs of the body of A and a husband or wife, this constitutes a life estate and a contingent remainder in the issue. Since, while the heirs of the body of A, they are also heirs of the body of the husband or wife (*Frogmorton v. Wharrey*, 2 Wm. Bl. 728, 731, 3 Wilson, 125,

144; *Gossage v. Taylor*, Stiles Rep. 325; *Lane v. Pannel*, 1 Roll. Rep. 230, 317, 438. Fearne, p. 212).

“It is not enough that the limitation should be to the heirs of the person having the particular estate and of another who might have a common heir of their bodies.”

*Mudge v. Hammill*, 21 R. I. 283, 32 Atl. 544; 79 A. S. R. 802, 805.

*Dawson v. Quinnerly*, 118 N. C. 188, 24 S. E. 483, 484.

We will not cite further American cases, but will reserve them under another head. While we will deal more fully with the point when discussing the Hawaiian law and the American cases, we think at common law the devise to the trustees “upon default of issue” strongly indicates an intention to make alternate limitations upon the termination of the first estate by the entirety upon the death of the survivor, or what is termed a contingency with a double aspect, or a devise upon two alternative contingencies (*Ninia v. Wilder*, 12 Haw. 104; Fearne on Remainders, p. 43). It is only necessary to hold that the testatrix used the word “issue” and “heirs of the body” in the sense of issue (she certainly so used them) to bring the devise within such cases as *Lodington v. Kime*, sometimes cited as *Luddington v. Kime*, 1 Salk. 224, 1 Ld. Raym. 203, cited with approval by the Hawaiian court in *Ninia v. Wilder* and by the Supreme Court of the United States, *De Vaughn v. Hutchinson*, 165 U. S. 564.

An estate by the entirety in tail can be in special tail or in general tail, and without the words "of either" this devise would undoubtedly give an estate tail general to the survivor, which result curiously enough, is attributed by the court to the addition of the words "of either"! Giving, therefore, due weight to these words particularly when taken into conjunction with the devise over, in the absence of issue of either, is it not clear that at common law the devises at the termination of the estate devised to the first takers are alternate contingent remainders to the heirs of the body of either or to the trustees, and not separate moieties in tail in the first takers with cross remainders and a contingent remainder upon an indefinite failure of issue?

The fact that one is compelled to insert the words "for life" after the words "of devise" to Kahakuikoi and Kealohapauole, does not change the posture of the case. Judge Story says of this in a case where the devise was to A and "to his male children lawfully begotten of his body and their heirs forever, to be equally divided," holding this to be an estate for life to A and a remainder in fee to his male children, that "where the estate is indefinite the party takes for life only, unless a different intention be clearly indicated," and again "where words of devise are used giving an estate to A and then to B, no one would doubt that the estate to A would be a life estate, although not so expressly limited." (*Sisson v. Seabury*, 1 Sumner 235, 244.)

This is an ancient rule and so in a devise to A and the heir male of his body lawfully begotten \* \* \* and if A dies without leaving any son of his body lawfully begotten, then over, it was held following the *Archer's Case* (1 Rep. 66a) that it was a life estate and remainder and the fact that there was no express life estate

“seems hardly sufficient to take the case out of the effect of a rule founded on an intention manifested by the testator of making the person who shall fill the character of heir male the origin or stirps of a new line of descent differing from the one which would arise from the use of the words heir male of the body or heirs male of the body.”

*Chamberlayne v. Chamberlayne*, 6 Ell. & B. 625, 635.

The court in the case just cited commented on the fact that a life estate is of less importance than subsequent words, showing that “the first clear words of inheritance ‘heirs of the body’” were intended to be the origin of a new line of descent.

It takes slight words of explanation to change a fee tail into a devise over, thus “share and share alike if more than one,” with a devise over “in default of issue to be lawfully begotten by me.”

*Gretton v. Haward*, 6 Taunt. 94, 128 E. R. 968.

so “as tenants in common with a clause in default of issue.”

*Browne v. Holme*, 2 Wm. Bl. 777, 96 E. R. 454, 6 (Note).



“share and share alike” and “their heirs and assigns forever,”

*Right v. Creber*, 2 B. & C. 866, 108 E. R. 322.

The “first, second, third, fourth and every other son successively” with a devise “in default of such issue.”

*Lawe v. Davis*, 2 Strange 849, 93 E. R. 892, 2 Ld. Raym. 1561, 92 E. R. 511.

“equally to be divided and to take as tenants in common” with a devise over “if devisee should die without such issue.”

*Crump v. Norwood*, 7 Taunt. 362, 129 E. R. 145, 148.

“as well females as males and to their heirs and assigns forever, to be equally divided between them as tenants in common.” (*Doe v. Laming*, 1 Wm. Bl. 265, 96 E. R. 146; *North v. Martin*, 6 Sim. 266, 58 E. R. 593.) Here the immediate devise was to the husband and wife and to the survivor, with special tail to the heirs of the body of the husband begotten of the wife, and the tenancy in common was, if there were more than one child.

The rule at common law deducible from these cases is well put by Mr. Justice Blackstone in *Perrin v. Blake*, Har. Lt. 489, 504, E. R. Cases, Vol. 10, 707, but the test is “how those heirs were intended to take whether as descendants or as purchasers.” We respectfully urge that even at common law the estate devised being an estate by the entirety, the descent of which would be to the heirs of the body of the sur-

vivor where the descent may be to the heirs of the body of the other and another, or the heirs of the body of the survivor and another, and where these heirs clearly take as tenants in common not as joint tenants they must take by purchase and not by descent.

The failure to specifically declare the estate has never been decisive (*Chamberlayne v. Chamberlayne*, ubi supra). In addition to the cases already cited, may be cited *Doe v. Burnsall*, 6 T. R. 30, 101 E. R. 419; *Lawe v. Davis*, ubi supra; *Doe v. Laming*, ubi supra.

### III.

EVEN IF THE DEVISE WOULD BE CONSTRUED AS AN ESTATE TAIL AT COMMON LAW, SUCH CONSTRUCTION WOULD NOT BE IN ACCORDANCE WITH THE CURRENT OF JUDICIAL DECISION IN THE UNITED STATES, EVEN WHERE THE COMMON LAW PREVAILS.

“In the United States the tendency is to reject what are considered rules of property in England if out of joint with the times, and to suffer rules of construction to yield readily to the manifest intention of the testator. \* \* \* There exists even greater reason for departure from or failure to adopt English technical rules or precedents here than in the United States.”

*Rooke v. Queen's Hospital*, ubi supra.

The common law is ascertained in Hawaii under the Act of 1893 (R. L. Haw. 1915, Sec. 1) by American, as well as English decisions. Under the English decisions, in many cases, the apparent intention of the testator yielded to fixed legal meanings given to words by the courts held to be the safer rule. Such is not the law generally in America, and certainly not in Hawaii.

Thus many English decisions cited by Jarman in regard to superadded words of limitation (not words of explanation) are arrived at by rejecting words or giving less weight to words which may express the intent of the testator, but which are rejected under common law rules as being inconsistent with the fixed meaning which the law gives to the words "heirs of the body" as creating an estate tail, even if such is clearly against the intention of the testator, chiefly under the rule in *Shelley's Case*.

In America, these cases would not generally be followed. Thus, where the words were "to such issue, their heirs and assigns forever," the issue was held to be the "springhead of a new and independent stream of descents."

*Daniel v. Whartenby*, 17 Wall. 639.

*Green v. Green*, 23 Wall. 486.

In a case similar to those cited by Jarman, "to her heirs begotten of her body and to their heirs and assigns," it was held, repudiating the English cases, that the children "become the root of a new succession, and take as purchasers and not as heirs."

*De Vaughn v. Hutchinson*, 165 U. S. 564.

*De Vaughan v. Hutchinson*, as well as *Green v. Green*, raise another consideration, that the word "issue," which is used in this devise interchangeably with "heirs of the body," is a less technical word and at common law yielded more easily to a supposed intention of the testator to benefit the issue, and so while the addition of the words "their heirs" to a devise to A and the heirs of his body would at common law be construed as an estate tail, as shown by the cases cited by Jarman, where the remainder is to his issue, "with words of limitation superadded, the word 'issue' will in that case be construed to be a word of purchase."

6 Cruise, Dig. 3d Am. ed. 259.

*Luddington v. Kime*, 1 Ld. Raym. 203.

*De Vaughn v. Hutchinson*, ubi supra.

Mr. Justice Shiras says in the latter case that whether *Luddington v. Kime* has been overruled in England is immaterial, that there is no decision in this country which questions the rule. The learned justice also quotes from a case in 3 App. D. C. 50:

"It is certainly a well-settled principle in the law of real property, indeed as well settled as the rule in *Shelley's Case*, 1 Coke 88, itself, that where an estate is expressly devised to a person for life, with remainder to the *heirs of his body*, and there are words of explaantion annexed to such word 'heirs,' from whence it may be collected that the testator meant to qualify the meaning of the word 'heirs,' and not to use it in a technical sense, but as descrip-



tive of the person or persons to whom he intended to give his estate, after the death of the first devisee, the word 'heirs' will, in such case, operate as a word of purchase."

and cites from *Daniel v. Whartenby*:

"But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail."

concluding:

"The word 'heirs' in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as 'heirs.' But the devise here was to Martha Ann for life, and at her decease to her heirs begotten of her body and to *their* heirs and assigns—a restricted class of heirs—and this limitation shows that it was the intention of the testator that Martha Ann's children should become the root of a new succession, and take as purchasers and not as heirs."

Now, if the use of the superadded words "their heirs and assigns" makes the children the root of a new succession and take as purchasers, because those words show a restricted class of heirs, surely in this case, where persons who are not the heirs of the body of the survivor may take and where the taking is in entirely different proportions, it must be held that

the root of a new succession is formed and that the words are words of purchase.

The West Virginia court has applied this rule in holding that in a devise "for themselves, and after them to their heirs," although "heirs" is usually a word of limitation, yet such words are easily construed to be words of purchase.

*Irvin v. Stover*, 67 W. Va. 356, 67 S. E. 1119.

"While it is true that courts will respect and enforce the technical meaning of 'heirs' or 'heirs of the body,' so as to make them strict words of limitation, after a life estate to the ancestor, where there is nothing to show that they are not used in a different sense, there is a disposition, *especially since the abolition of estates tail*, to seize upon slight circumstances to make them words of purchase. *May v. Ritchie*, 65 Ala. 602; *Price v. Price*, 5 Ala. 581; *Williams v. McConico*, 36 Ala. 22; *Dunn v. Davis*, 12 Ala. 140; *Watson v. Williamson*, 129 Ala. 362, 30 South. 281."

*Findley v. Hill*, 133 Ala. 229, 32 South. 497, 498.

So in a later case that court construed "heirs" to mean children, citing 30 Am. & Eng. Ency. Law (2d Ed., p. 667).

"When a will fairly construed is susceptible of two constructions, one of which would render it inoperative and the other give effect to it, the duty of the court is to adopt the latter construction."

*Castleberry v. Stringer*, 176 Ala. 250, 57 So. 849, 850.

So in Pennsylvania a devise "heirs or issue lawfully begotten on the body of the said G.," are not words of limitation, but gave "children a distinct and independent interest as tenants in common."

*Nebinger v. Upp*, 13 Serg. & R. 65, 69, 70.

So "his lawful heirs born of his wife," held that the heirs of their common body take a contingent remainder. *Thompson v. Crump*, 138 N. C. 32, 50 S. E. 457.

That court also held that the rule in *Shelley's Case*, that the words heirs of the body should be construed as words of limitation, only applies where "the same persons will take the estate whether they take by descent or purchase, in which case they take by descent" (*Howell v. Knight*, 100 N. C. 254, 6 S. E. 721, 722), and in another case where the heirs of the body of the wife were limited to those by her present husband, it was held that the heirs took by purchase; *Dawson v. Quinnerly*, 118 N. C. 188, 24 S. E. 483, 484; see also *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684, 688; *Bird v. Gilliam*, 121 N. C. 326, 28 S. E. 489, 490.

The Federal Court in Georgia has held that a devise to A and her heirs "and if A should die without issue living at her death, then in default of such issue, to E." Held that the word "heirs" was construed by the defining word "issue" and the alternative phrase in default of such issue, that it was A's

heirs of the body who took an estate by devise under it. *Myrick v. Heard*, 31 Fed. 241, 243-4.

Somewhat like the case at bar is an Illinois case, of a deed between A and B, party of the first part, and C and D, his wife, "during their or either of their natural lives, and in fee to the heirs of the said C and his wife, the party of the second part," where, by the deed the property was conveyed "unto the said party of the second part, their heirs and assigns \* \* \* to have and to hold \* \* \* said land \* \* \* unto the said party of the second part, their heirs and assigns forever." C and D had children, and the court held said party of the second part to include the heirs, and that "the heirs" mean heirs of the body of the two, and that the deed passed a life estate and a remainder in fee in the heirs of the body.

*Hall v. Hankey*, 174 Fed. 139.

So in Illinois a devise over to the heirs of the body, their heirs and assigns; held that this indicated the individuals who would be heirs of the body at the decease, and therefore they took by purchase.

*Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N. E. 669.

#### IV.

WHATEVER THE DEVISE WOULD HAVE CONSTITUTED AT COMMON LAW, UNDER THE HAWAIIAN SYSTEM, THIS DEVISE SHOULD BE CONSTRUED AS A LIFE ESTATE



## IN THE FIRST TAKERS AND ALTERNATE CONTINGENT REMAINDERS IN THE CHILDREN, OR THE TRUSTEES.

The last of the Kamehamehas dying makes her will. She has many dependents on her bounty, but so far as the evidence shows, only one family of relatives. Kahakuakoi was her cousin and not only was she dependent on Mrs. Bishop's bounty, but so also were her husband and their children, Niulii, Lydia and George, who lived with Mrs. Bishop. Kahakuakoi was not beyond the age of child bearing, and in fact had children born after the making of the will, who have since died. Pauahi provided for many friends and many dependents and in all instances save one, apart from the gift of some personal property to her husband, the provision was for life only and the property then reverted to the trustees. When the testatrix made provision for these dependent relatives, including the grandfather, grandmother, the mother, uncle and aunt of the plaintiff, she made a different provision, which the Circuit Court and the Supreme Court of Hawaii held constitutes an estate by the entirety in the first takers and which was "intended to create an estate other than a fee simple" for which "No authority exactly in point has been found" (Tr., p. 46), but held that the testatrix did not intend to create a "life estate or estates and remainder" because she had elsewhere shown that she knew how to express an intention to create a life estate and a remainder, and cites a devise in the fifth

paragraph of the first codicil to K. and H. his wife "to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees upon the trusts named in my said will (Tr., p. 86), and concludes that the testatrix intended an invalid and impossible gift, viz: an estate by the entirety in tail with several inheritances. This reason does not seem sufficient because the testatrix had in mind in this instance third parties as the then objects of her bounty for whom she wished to provide. In the case cited by the court the trustees were to take absolutely; in this case they were to take only when husband and wife both left no heirs of the body, or, as the will puts it, "upon default of issue," and so she inserted the words "unto them," viz: upon the same devise as she had given to the other husband and wife "*and to the heirs of the body of either.*" This is a plain, obvious and reasonable construction, but when the further consideration is added that the devise, as construed by the court, creates an invalid estate which has "no place under the laws of Hawaii," "was never a part of that system," "or imported into these Islands," "repugnant to the policy of free alienation of property," "out of place," "of which there is no instance of recognition \* \* \* or of their concomitants, such as fines and common recoveries in the history of these Islands" whose statutes "conflict with the idea of the existence of estates tail," and then the court converts this estate tail into a fee simple which the tenant could dispose of by will, could alienate, in which

the heirs general take, whereas under the estate tail (the intention to create which is imputed to the testatrix), the tenant could not dispose by will, could not alienate or cut off the heir and in the descent of which males were preferred to females, and the eldest male and his descendants to younger males, in which all descendants took *per stirpes*, the result does not commend itself to reason. The necessities of the case go farther than this. If the intention on the part of the testatrix was to create an estate tail by the use of the words "of either" and the devise over to the trustees, she also intended to create cross remainders, an estate which does not come by descent, but by purchase; remainders which the decision of the court wipes out with one fell sweep, and in doing so converts the devise over to the trustees from a contingent remainder into an executory devise, because having converted the present estate into a fee simple the only way which that devise can take effect is by an executory devise, which the court also finds was not intended since the intention is imputed to Mrs. Bishop to create an estate tail, in which case the devise would be a contingent remainder. We must go farther, and since the testatrix must have known that the estate tail, which she had in mind, was impossible under the law of Hawaii, and assume that she deliberately created an invalid, impossible and unheard of estate and then left it to the court to "approximate" what should be her will. As a matter of law this clause is the language of the testatrix, and as a matter of fact we would court the

opportunity to prove that it was her language and not that of the scribe, who drew the will, but Judge Hatch, who presumably drew the will and the codicil, knew that an estate tail was impossible in Hawaii; he knew that it had never been heard of; he knew that it was invalid; and more than that, he was born and trained in a jurisdiction which repudiated estates tail as inconsistent with the American system, and declared that "Any attempt, therefore, to limit the descent of estates here to any other course of descent must be futile," in a case relied on by Judge Frear in the Rooke case, *Jewell v. Warner*, *ubi supra*.

Estates tail were absolutely unknown in Hawaii, but contingent remainders were not. They were a natural method of devising a remainder after a life estate, and there was nothing in reason which would prevent alternate contingent remainder. (*Ninia v. Wilder*, *ubi supra*.) It is, therefore, reasonable to suppose that the testatrix after having made up her mind to devise to the husband and wife for their lives and the life of the survivor, which is the present devise according to all constructions, intended, and did devise the remainder to the heirs of the body that either might leave and if neither left such heirs of the body, then to the trustees, since the objects of her bounty were exhausted. Such a construction should be adopted because it is a reasonable construction and construes the devise as a lawful devise, providing for the objects of her bounty, and providing for them in the order which she must have intended. A



construction adopted by the court is confessedly not the intention of the testatrix; it confessedly defeats that intention, and should not be adopted, not only for that reason, but because it imputes to her an intention to create an estate which she did not know of, and which, if she did know of, she would have known was invalid.

(a) *The holding "that the intention of the testatrix was to create \* \* \* an estate in tail" and that there was "no doubt as to what the testatrix intended" is untenable.*

We observe that this is not a holding that the devise at common law would create a fee tail, but that the testatrix *intended* such an estate, which is, as we have said, inconceivable.

1. Such an estate must have been unknown to the testatrix, for the Hawaiian court can "find no instance of recognition of estates tail or of their concomitants, such as fines and common recoveries, in the history of these Islands.

2. The estate is a result of technical rules applied to a feudal system which never existed in Hawaii and founded on conditions that are practically obsolete elsewhere, and never existed here.

3. Estates tail have no place under the laws of Hawaii, and were never a part of that system. Whatever feudal system there was in Hawaii was abolished by the establishment of a land system in 1846, for the purpose of awarding land titles.

4. "The movement was in the opposite direction,"

and while “estates tail are repugnant to the policy of the free alienation of property” and out of place in the United States, here, where we are “one remove farther from Old England,” they are still farther out of place.

5. Estates tail are inconsistent with the statutory laws.

6. An estate tail is absolutely inconsistent and characteristic of the fee simple recognized by those laws.

All these propositions are set forth in the learned opinion of Judge Frear in the *Rooke* case, and while the court in this case says something about a vague impression, which they do not seem to be able to put their finger on, or to state how prevalent it was, that fee tails existed in these Islands, and while the courts say that a fee simple and a fee tail “belong to the same genus” (whatever that may mean, for “genus” is a biological and not a legal term), we place against this vague understanding the decision in the *Rooke* case, which states the understanding of the bar and the understanding of the community at the time when this will was written, more accurately and more forcibly than we can do.

There are other reasons why, even if at common law these words might create an estate tail, they do not in Hawaii, and in this particular will.

7. The immediate devise being an estate by the entirety, is not susceptible even at common law, to remainders in severalty in the first takers; such remainders must be in others and not in the first tak-

ers, and this is clearly so in Hawaii under this devise.

In Hawaii a devise does not create a joint tenancy unless the word "joint" is expressly used. Joint tenancies were early repudiated on the ground that the common law was not in force; that they were opposed to the policy of the law; that there were no feudal tenures existing in Hawaii, and that a devise to two was generally understood and treated as creating estates in common (*Awa v. Horner*, 5 Haw. 543). On the other hand, estates by the entirety were commonly recognized in Hawaii.

Under a devise to:

"a husband and wife, they took neither as tenants in common nor as joint tenants, but by the entirety. *Paahana v. Bila*, 3 Haw. 725; *Wailehua v. Lio*, 5 Haw. 519; *Kuanalewa v. Kipi*, 7 Haw. 575."

*Robinson v. Aheong*, 13 Haw. 196, 197.

and remainders were well recognized: *Maughan's Will*, 3 Haw. 233, decided in 1870; *Zupplein v. Austin*, 6 Haw. 8, decided in 1867.

8. This being an estate by the entirety, the succession would be to the heirs of the survivor. The succession by this devise is limited to heirs of the body of the survivor, enlarged to include the heirs of the body of the deceased spouse by another, restricted by shutting out the heirs of the survivor not heirs of the body, in case the predeceasing spouse left heirs of the body then living, and again restricted by a provision that upon default of heirs of the body of either,

the trustees should take. This is the plain effect of the words of explanation "of either."

9. It is more probable that the testatrix intended a plain and simple estate by the entirety for life to the first takers and then if either left heirs of the body, they should take, and if neither of them had heirs of the body living at the expiration of the estate by the entirety, the trustees should take, estates well recognized in Hawaii, than that she intended at the death of the survivor that the two dead devisees for life should take an estate unknown to her, unknown in Hawaii, and invalid there, with cross remainders which were also invalid, which would also give estates in dower and curtesy to third persons not the object of her care, in order that this might be converted into a fee simple estate, which she did not intend, and the devise over to the trustees from a contingent remainder to an executory devise, which fee simple estate also would have dower and curtesy in any surviving spouse of the survivor, none of which was contemplated by the testatrix.

(10) The only reasons given by the court are two: One, that the testatrix knew how to give an estate for life with a remainder over, which we have met by showing that these were cases of remainders directly to the trustees. Here the interest of the heirs of the body is interposed between, and the fact proves nothing. The other is that there was a vague impression formerly that an estate tail might exist. How weak this is is illustrated by the history of this title.



The interest of the life tenants, which in fact endured until June 8, 1914, was foreclosed January 26, 1893, for \$4700. On October 23, 1894, the purchaser, Charles R. Bishop, conveyed "his right, title and interest" to Mark P. Robinson for \$6000 (Tr., pp. 76, 77). Robinson, who the day before had obtained from Kahakuakoi and Kealohapauole, George and Lydia for \$5 a release of "all their right, title, interest and estate vested, contingent or in expectancy in \* \* \* the same premises *devised to the parties of the first part by the will of Bernice Pauahi Bishop,*" with a further release of every right "vested, contingent or in expectancy" (Tr., pp. 96, 97), and that Robinson, thinking that the plaintiff was illegitimate and having this deed from the reversioners, conveyed with warranty for stock of the par value of \$150,000 in the defendant on February 12, 1897, stock of which it is common knowledge that several times that value was realized. Compare the amounts and the unwillingness of the cautious Charles R. Bishop, whose wife had devised the land, to make anything more than a release, and the willingness of Mark P. Robinson to give a warranty deed after he had obtained a release from George and Lydia, the only "heirs of the body of either," as he supposed, to whom it had been devised.

(b) *The surrounding circumstances, the clear designation of the objects of the testatrix's bounty, and the language of the devise, compel the conclusion that the testatrix intended to provide for faithful depen-*

*dents during their lifetime; that the estate should then go to the issue of either, who were also at the time of the making of the will, dependent on and the object of the testatrix's care, but in case, at the death of the survivor there was no living issue of either, then to her trustees.*

The trial court declared that among the circumstances which the court should take into consideration were: "the relations between her and the devisees, between her and the children of the first takers, the dependence of the family upon her bounty at the time the will was made for their home and their subsistence" (Tr., p. 31), and found that "Kahakuakoi was a relative of Pauahi. The degree of relationship is not material, but is classed under the same generic Hawaiian term, which is best translated 'cousin.' That Kahakuakoi was always treated by Pauahi as a relative, living under Pauahi as one of her numerous retainers at the place known as Aikupika, with other retainers, relatives and servants of Pauahi" (Tr., p. 19). "Niulii was a kinswoman of Pauahi, a retainer about her house, and under the direct care and guidance of Pauahi. Niulii was a well known young woman. As one witness puts it, 'She was a girl who could not be hid.' She was of the blood of the aliis," "one of her own blood and of the blood of the aliis." "The testimony in the case shows that the plaintiff's grandmother was a cousin of the testatrix, and that the testatrix showed a personal interest in the plaintiff's mother and a *practi-*

*cal interest in the welfare of the plaintiff herself.*" (Tr., p. 53.)

The objects of the testatrix's bounty are made clear by the language of the devise, which is "unto them," that is to say, "unto" Kahakuakoi and Kealohapauole "and to the survivor of them \* \* \* so long as *either* of them may live" "and to the heirs of the body of *either*" "upon default of issue, the same to go to my trustees."

Three objects of the testatrix's bounty are here specified: "Kahakaukoi and Kealohapauole and the survivor," "the heirs of the body of either," "the trustees." In the devise to each she used the word "to" or "unto." In the devise of the annuity she uses both, using also the expression "and to," the same which she uses before the words "heirs of the body of either"; "to" is a word which she used fifteen times to indicate a devise. On the other hand, when she made a devise in fee simple she did not use the words "and to" or "to" before the words "heirs and assigns."

(c) *The words "and to heirs of the body of either \* \* \* upon default of issue the same to go to my trustees" are decisive in favor of alternate contingent remainders.*

1. The words "issue" and "heirs of the body of either" clearly mean the same thing. They mean issue who would inherit under the statute of distribution.

The words "heirs of the body" are like the word

“issue” (*Houghton v. Kendall*, 7 Allen 72, 76). The term means “such of the issue or offspring as may lawfully inherit” (*Waters v. Bishop*, 122 Ind. 516, 24 N. E. 161). See, also, *Coates v. Burton*, 191 Mass. 180, 77 N. E. 311.

2. The default of issue of either means a definite default of issue at the death of the survivor.

In *Hemen v. Kamakaia*, Judge Frear said:

“The words ‘without issue’ may mean a definite or an indefinite failure of issue. In a case like the present they would naturally be taken to mean a definite failure, for the popular idea certainly is that the words ‘without issue’ in the phrase ‘die without issue’ refer to the time of death.”

*Hemen v. Kamakaia*, 10 Haw. 547, 554, 555.

and in the *Rooke* case, speaking of the words “on failure of issue,” “without issue” and “without leaving issue,” all of which are said to have been held to import an indefinite failure at common law:

“The presumption that these words import an indefinite failure of issue grew up under conditions that no longer exist and at a time when executory devises were not permitted at all. It is now generally conceded that the words ‘without leaving issue’ naturally mean ‘without leaving issue surviving’ and that to hold that they import an indefinite failure of issue would in most instances be in violation of the manifest intention of the testator. Accordingly, the rule supporting such construction has been abolished



by statute in England and in some of the United States. In other States it is either rejected by the courts or regarded as having so little force as to overcome by very slight expressions pointing in the other direction."

*Rooke v. Queen's Hospital*, ubi supra, p. 399.

Kent says of the statutes declaring for a definite failure that it is impossible not to feel relief and look with complacency at this final settlement by a legislative enactment.

4 Kent's Com. 281.

The defendant in the court below undertook to differentiate between the words used in the foregoing cases and such words as "upon default of issue" and "on failure of issue," but the *Rooke* case recognizes that there is no distinction between these expressions (p. 399), and it has been well said that under the common law

"‘die without issue,’ or ‘in default of issue,’ or ‘for want of issue,’ or ‘on failure of issue,’ or ‘die without leaving issue,’ import the same thing, to wit, an indefinite failure of issue."

*Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399, 406.

At common law there was no distinction, and if one of these expressions now imports a definite failure of issue the others would.

3. Since the estate which the trustees would have taken is to be determined on a contingency at the

death of the survivor, the "heirs of the body of either" who are to take are persons who would then take as the heirs of the body of either, and these must then take as contingent remaindermen and not otherwise, for if the expression does not refer to the whole body of heirs, and include all the persons of all generations, but to those persons who would be heirs of their bodies at the decease of the survivor, the latter take by purchase and not by descent.

*De Vaughn v. Hutchinson*, ubi supra.

(d) *Even if the devise to the first takers be considered indefinite, the limitation over upon death to the trustees supports the construction that a life estate was intended to the first takers.*

Nothing is better settled in Hawaii than that

"An indefinite devise followed by a limitation over upon the death of the devisee would ordinarily be held to create a life estate in the first taker. *Paa-luhi v. Keliihaleole*, 11 Haw. 101; *Mouritz v. Lewis*, 12 Haw. 19; *Robinson v. Aheong*, 13 Haw. 196, 200."

*Paiko v. Boeynaems*, 22 Haw. 233, 240.

If this devise had been an indefinite devise to Ka. and Ke., upon death to the trustees, the devise to Ka. and Ke. would be construed as a life estate. Where, as here, the immediate devise to them is not indefinite but must be an estate by the entirety for life, then to the trustees, unless either of them have issue, the more reasonable construction is that alternate contingent remainders are created in the heirs

of the body of either and the trustees, than that a vested estate of a different character, namely, a tenancy in common of an invalid character, namely, in tail, should be implied in the first takers who could never enjoy it.

(e) *The recent case of Brede v. First National Bank, 23 Haw. 537, construing the Rooke case, seems decisive that the words "heirs of the body of either" are words of purchase and not of limitation.*

The will in the Brede case devised all property to his wife for life and

"After the death of my said wife my property shall descend as follows:

"Unto my son, William K. Bailey, all those certain premises \* \* \*

"If any of the devisees hereinabove in this will named shall die before my wife dies I then direct that the share that would otherwise have fallen to such person shall descend to the then heirs at law of such person."

William K. Bailey mortgaged the property to the defendant and died before the testator, leaving two daughters and a son surviving him. One of the daughters was the plaintiff. It was held, following the Rooke case, that whether William K. Bailey took a vested remainder, or an alternate contingent remainder with his heirs, was not necessary to determine; that the heirs took either by executory devise

after the vested remainder or by an alternate contingent remainder.

*Brede v. First National Bank*, 23 Haw. 537.

The word "descend" was used, which would indicate that the words "heirs at law" were words of limitation and not of purchase; the case at bar is much stronger in favor of an alternate contingent remainder.

## V.

THE NAHAOLELUA AND BOEYNAEMS DECISIONS, REAFFIRMED IN THIS CASE, HOLD THAT A DEED TO A. AND THE HEIRS OF HER BODY CAN BE CONSTRUED AS EITHER A FEE SIMPLE OR A LIFE ESTATE AND CONTINGENT REMAINDER, AND THAT IF IT APPEARS THAT A FEE SIMPLE WAS NOT INTENDED, THE WORDS WILL BE HELD TO CREATE A LIFE ESTATE AND REMAINDER. IN THIS CASE BOTH COURTS HELD THAT A FEE SIMPLE WAS NOT INTENDED, AND THEREFORE THE DEVISE MUST BE HELD TO BE FOR LIFE WITH A CONTINGENT REMAINDER.

(a) *The Nahaolelua and Boeynaems decisions must be construed to hold that since the words in question can be construed either as a fee simple or a life estate and contingent remainder, if it appears that a fee simple was not intended, the words will be construed to create a life estate and remainder.*

In the Nahaolelua case there was a trust deed. The trustees conveyed to Elizabeth, the beneficiary



under that deed, with habendum to her, "party of the second, and the heirs of her body forever," in trust for her children born and to be born.

The court decided:

First, that the decision "depends solely upon the force and legal effect" of the second trust deed, since Elizabeth's right under the first trust deed was absolute.

Second, that the words "heirs of her body" would at common law technically create an estate tail.

Third, that under the Rooke case an estate tail cannot exist or be created in the Territory, so that the deed must be construed as granting a fee simple or a life estate and remainder, "according to which appears to most nearly carry out the intention of the testator"; that for this purpose all parts of the deed are to be considered, and that construing the deed as a life estate and remainder in fee simple to the heirs of her body

*"gives effect as nearly as possible to those formal parts of the deed, usually regarded as being sufficient, under the law, to pass title. And, in this connection, we deem it pertinent to observe that the following provision, contained in the deed before us, reading: 'In special trust for the use and benefit of her said son Edward Nahonoomaui Kia, and such other child or children as may hereafter be born to her, and his or their heirs and assigns, forever as he or they shall arrive at the age of legal majority,' being repugnant and contradictory to the formal*

parts of the deed, *must be disregarded*. *Simerson v. Simerson*, ante p. 57."

*Nahaolelua v. Heen*, ubi supra, p. 377.

The Boeynaems case, in which Chief Justice Robertson concurred, declined to reconsider the matter, the court saying:

"We are satisfied that the conclusion reached in the former case on each question presented, was correct."

*Boeynaems v. Ah Leong*, ubi supra, p. 700.

But one conclusion can be drawn from this: That the court held that as it appeared from the deed that a fee simple was not intended, the words would be construed as a life estate and remainder by reading in after the words "party of the second part" "for her life" and before the words "heirs of her body" "after her decease to," so that the clause would read "party of the second for her life, and after her decease to the heirs of her body forever." Obviously, this was not what Elizabeth intended. If the void trust clause is considered, as that clause shows that the formal parts of the deed merely intended a dry trust to Elizabeth for the use and benefit of her children, or at most a beneficial estate until they arrived at the age of legal majority, this clause does not (as said by the court in this case, which reverses the order of reasoning in the *Nahaolelua* decision, which says nothing of the kind) assist the court "how best to *approximate* the intention of the party"

further than to indicate that a fee simple was not intended. It indicates a far different interest than that "approximated" by the court.

The real difficulty in the *Nahaolelua* case arises out of the quotation from the *Rooke* case that in some states where fee tails do not exist such a devise "is considered one or the other according to which appears to most nearly carry out the intention of the testator," which is a hasty and inaccurate statement, for there are no such cases, and the decision at bar, which cites all the cases, shows this; for *Archer v. Ellison*, 28 S. C. 238, 5 S. E. 713, and *Pier-son v. Lane*, 60 Ia. 60, were decided on the ground that a fee simple conditional was created and the condition had been fulfilled, an estate which the opinion shows cannot exist here.

In *Jewell v. Warner*, *ubi supra*, also cited in the *Rooke* case, the will was made in 1792, and the court held that as the statute of 1771 had been amended in 1789 so as to allow a free conveyance of estates tail, it had the effect of abolishing estates tail and making them fee simples. This case was decided in 1837, and in the same year the legislature enacted into law the very proposition.

*Merrill v. American Baptist Missionary Union*, 73 N. H. 414, 62 Atl. 647, merely held that the dropping out of this statute by the revision of 1867 did not revive a fee tail, but the devise in that case was held not to necessarily create at common law a fee tail.

We must confess to a little surprise that *Calder v. Davidson*, 59 S. W. 300, is cited at all. The case is

not reported officially, and the reasons, as we pointed out in the court below, are plenty. In that case the deed, as set forth in the opinion, is to "Mary Walker Calder and the heirs of her body by the said R. J. Calder."

The case cites to support its decision *Simonton v. White*, 93 Tex. 50, 53 S. W. 339, where "bodily heirs" were construed to be words of purchase and not of limitation, in spite of the rule in *Shelley's Case* which is in force in Texas, relying upon *Doe v. Laming*, ubi supra, and *Hancock v. Butler*, ubi supra, that an estate should be construed to pass the greatest estate to the first-named grantee which the instrument is capable of passing by fair construction; but in that case a devise "unto the heirs of their body," to be equally divided after the decease of a father and mother, was held to be a contingent remainder to the heirs of the body after the death of the survivor. Citing Indiana and Kentucky cases under statutes converting a fee tail into a fee simple, the court continues:

"If it cannot be held that the provision of our constitution forbidding the entailing of estates would have the same effect as has been given to the statute in Indiana, and enlarge the estate to a fee simple, we are of opinion that the case comes within the operation of the rule in *Shelley's Case*. The rule is in force in this state as a rule of law, and has been unhesitatingly enforced whenever the situation invoked its application. This rule, at the common law, did



not apply to instruments creating estates tail either general or special. Since by the language used the heirs of the body of Mary Walker Calder by R. J. Calder would have taken thereunder as heirs in indefinite succession, and since estates tail are forbidden, *we think the rule in Shelley's Case applies, and Mrs. Calder took the fee-simple estate."*

We are astonished that the Hawaiian court should have cited a case basing its decision on the application of the rule in *Shelley's Case* to such a deed! *Rowland v. Warren*, 10 Ore. 129, also holds that fee tails do not exist in Oregon, but would create fee simple conditionals, the condition being complied with in the instant case.

We strenuously urge that under the general rules of construction referred to in the Nahaolelua case it is not possible that the court intended to lay down as a rule that in construing a will the court could guess at the intention of the testator and "approximate" whichever estate, fee simple, or for life with a contingent remainder, the court thought most fitting. As is said in the case at bar, courts cannot "conjecture." There must be some definite rule by which the Nahaolelua case is decided. There is nothing to indicate that the deed in that case was intended to create an estate tail. There is not a shadow to show that it was intended to create a contingent remainder in the heirs of the body, excepting the use of that expression. Whatever there was, showed a definite estate, namely, a beneficial interest in them, but this

clause the court say must be disregarded. It did appear that the deed was not intended to create a fee simple. Therefore the court must have held that it created an estate for life and a contingent remainder for this reason alone.

*(b) In the case at bar, where it is found by both the courts that the testatrix did not intend to create a fee simple, and where there are explanatory words showing that she did intend to create a life estate and a remainder, the ruling in these cases, reaffirmed by the court below, necessitates holding this devise to constitute a life estate in the first takers and contingent remainder in the heirs of the body of either.*

There was no "attempt to create an estate in fee tail" in the Nahaolelua deed. That was far from the intention of the parties, and the court in that case did not so hold. There is no more evidence of an "attempt to create an estate in fee tail" in this case, where necessarily the words used would not create an estate by the entirety in fee tail, but an estate by the entirety for life and a remainder, and the question is what that remainder would be. The resemblance consists in an attempt to give an interest in the property to the heirs of the body. What Elizabeth "might have done had she been advised that she could not create" the estate in trust for the children is "left to conjecture." In this case we submit there is no conjecture. She intended that the descendants of either of them should take the estate before the trus-

tees. This does "show a preference for a life estate and remainder."

If this be not so, yet as the court has found that the testatrix did not intend to create a fee simple, the estate should be held to be an estate for life with contingent remainder, under these decisions.

Again, the will in this case does not contain a "mere limitation to the heirs of the body"; it is "*and to the heirs of the body of either*," the decision shows that the words "of either" had a material effect upon the devise, and if the cases relied on are applicable, then the words "of either" change the immediate estate into an estate for life, create separate remainders in the first takers, cross remainders in the heirs of the body of either spouse, and curtesy and dower in third persons, as the result of this "futile attempt to create an estate in fee tail by the testatrix." This is as far as possible from a "mere limitation to the heirs of the body," and we believe equally as far from showing that the testatrix was indulging in a "futile attempt to create an estate in fee tail."

As it is admitted that the testatrix did not intend to give a fee simple, and did intend to give something else, if she was guilty of a "futile attempt to create a fee tail," why, then, she must have known that there was no method of docking an entail by a fine or common recovery or by a conveyance, and that conditional fees did not exist, and she must have thought that her "futile attempt to create a fee tail" would at least give an estate which would go at the death

of the first takers to Niulii and Lydia and George and any other children of either.

At first sight, the statement of the court that the provisions giving a power to the beneficiaries "to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years \* \* \* the rent, however, after such decease to be paid to my executors or trustees," would seem to militate against plaintiff's theory, but it equally militates against the theory of the court, for, as we have shown, a life estate was given to Ka. and Ke. After their decease, leaving heirs of the body of either, the rents would clearly not be payable to the trustees under the court's theory of the estate. Whether that clause would authorize leases good against the trustees in case the trustees took at the death of the survivor upon default of issue is questionable; if it does the claim tends to support the plaintiff's theory of a life estate and remainder.

### *CONCLUSION.*

We think we have established these propositions:

(1) The immediate devise is an estate by the entirety to Ka. and Ke. for life and the life of the survivor.

(2) The decision of the court must be construed as so finding.

(3) The inheritance of an estate by the entirety, if in fee, is in the heirs of the surviving spouse; if in fee tail, in the heirs of the body of the surviving spouse.



(4) The words whether of inheritance or purchase, "heirs of the body of *either* mean the heirs of either or both, which would include issue of either spouse by another (so found by both courts).

(5) In this devise "issue" and "heirs of the body of either" mean the same thing.

(6) The devise over takes effect at the death of the survivor only in case each of the spouses left no heirs of the body.

(7) The testatrix did not intend a fee simple in the first takers (so found by both courts).

(8) It is less reasonable to *imply a devise* and an intention of the testatrix to devise the reversion to the deceased father and mother by an illegal estate, with illegal cross remainders, and dower and curtesy to persons not the object of testatrix's care, which estates she must have known the law would convert into estates she did not intend, rather than construe the words "and to" as *devising the reversion* to the children also dependent and of her own blood.

(9) It is a possible and reasonable construction that the reversion after the life estate passed to the descendants of either, viz: "the heirs of the body of either," failing which, to the trustees.

(10) Between two possible and reasonable constructions, one creating a legal and the other an illegal estate, the testatrix will be presumed to have intended the legal estate and not the illegal one, and certainly not one unknown to Hawaii, repugnant to her policy, never imported into the Islands, and which she presumptively knew nothing of.

(11) Under the common law, in England and still more in America, the heirs of the body of either would take as purchasers and not by descent, the succession not being to the heirs of the body of the survivor, and a reversion in the first takers will only be implied when words of severance like "respective" are used.

(12) The devise to the trustees upon default of issue leads to the same conclusion, since these words must be construed as meaning a definite failure of issue, and therefore "the heirs of the body of either" do not mean the whole body of heirs, but those persons who were heirs of the body of either at the termination of the immediate estate, who would then take as purchasers.

(13) This conclusion is fortified by other expressions in the will.

(14) The Nahaolelua decision, reaffirmed, can only be sustained on the theory that an estate tail at common law would in Hawaii become a life estate and contingent remainder, or else upon the ground that wherever it appears that the testatrix had the heirs of the body in mind in making the gift so far as not to intend a fee simple in the first takers, these words should be construed as creating a life estate and contingent remainder.

We respectfully submit that this court should not sustain the decision of the court below, which holds that the testatrix should be presumed to have intended an illegal estate rather than a legal estate, and that the law would convert this illegal estate

into a legal estate which the testatrix did not intend, rather than a legal estate which would provide for the persons and in the order evidenced by the will.

We respectfully ask for a reversal and that judgment be directed to be entered for plaintiff on the facts found.

Respectfully submitted,

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CASTLE & WITHINGTON,  
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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

---

HELEN K. KINNEY,

*Plaintiff in Error,*

VS.

OAHU SUGAR COMPANY,

LIMITED, a Corporation,

*Defendant in Error.*

---

## BRIEF FOR DEFENDANT IN ERROR

Upon Writ of Error to the Supreme Court of the Territory  
of Hawaii.

---

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Filed this.....day of February, A. D. 1918.

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# INDEX

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	Page
STATEMENT OF FACTS AND CONTENTIONS.....	1
ARGUMENT . . . . .	22
I. THE JUDGMENT BELOW SHOULD BE AFFIRMED UPON THE AUTHORITY OF <i>BOEYNAEMS</i> v. <i>AH LEONG</i> , 242 U. S. 612.	22
II. ALL PERTINENT CONSIDERATIONS COMBINE TO SHOW THAT THE DEVISE IN QUESTION WOULD CREATE A FEE TAIL IF FEES TAIL COULD EXIST IN HAWAII . . . . .	28
1. The aptest technical words are used for the creation of a fee tail. . . . .	29
2. All applicable presumptions favor a fee tail as against a life estate and remainder. . . . .	35
3. The present nature of the devise and the absence of words of separation or futurity strongly indicate an estate of inheritance. . . . .	37
4. An intention to give an estate of inheritance is clearly shown by the will and codicils taken as a whole. . . . .	42
III. THE MATTERS RELIED ON BY THE PLAINTIFF IN SUPPORT OF HER THEORY OF A LIFE ESTATE AND REMAINDER NOT ONLY DO NOT SUPPORT THAT THEORY, BUT ADD MATERIAL SUPPORT TO DEFENDANT'S THEORY OF AN ESTATE TAIL. . . . .	48
1. The word "either" not only does not militate against but substantially supports the theory of an estate tail. . . . .	49
2. The gift over "upon default of issue" not only does not militate against but substantially supports the theory of an estate tail. . . . .	74

IV. A DEVISE WHICH WOULD BE A FEE TAIL IN ANY PARTICULAR JURISDICTION, IF A FEE TAIL COULD EXIST THERE, WOULD, IF A FEE TAIL COULD NOT EXIST THERE, BE A FEE SIMPLE CON- DITIONAL OR, IF A FEE SIMPLE CON- DITIONAL ALSO COULD NOT EXIST THERE, IT WOULD BE A FEE SIMPLE..	87
1. This is the rule in all other jurisdiction and, subject to a qualification not material to the present case, is held to be the rule in Hawaii	87
2. The reasons for this rule are overwhelmingly conclusive . . . . .	94
3. The decisions are unanimous that what would be a fee tail at common law would be a fee simple (or a fee simple conditional where this is recognized) in the states in which fees tail do not exist and in which the ques- tion has been decided uncontrolled by stat- ute . . . . .	102
4. Similar unanimous decisions relating to per- sonal property are strictly analogous and lead to the same conclusion.....	108
5. Analogous decisions at common law relating to real property necessitate the same con- clusion . . . . .	112
6. Hawaiian statutory and case law both require the same conclusion.....	116
7. Statutes on the subject favor a fee simple in the first taker.....	118
V. APPLYING THE FOREGOING PRINCIPLES TO THE FACTS OF THIS CASE, THE ESTATE IN QUESTION MUST BE HELD TO BE A FEE SIMPLE.....	119
1. The will and codicils overwhelmingly necessi- tate this conclusion.....	119
2. The Nahaolelua and Boeynaems cases not only do not militate against but support this con- clusion . . . . .	121



VI. EVEN IF THE NAMED DEVISEES TOOK ONLY A LIFE ESTATE AND THE HEIRS OF THE BODIES A REMAINDER IN FEE SIMPLE, STILL THE DEFENDANT WOULD BE ENTITLED TO POSSESSION AND THE PLAINTIFF COULD NOT RE- COVER AT THIS TIME.....	128
SYNOPSIS OF WILL AND CODICILS.....	131

## CITATIONS

	Page
Act of 1847, Sec. IV, Ch. I.....	25
Act of 1892 (now R. L. of Hawaii, 1915, Sec. 1).....	25
Anonymous case, 3 Dyer 303f (73 Eng. Rep. 682).....	77
<i>Archer v. Ellison</i> , 28 S. C. 238 (5 S. E. 713).....	107
<i>Atcherly v. Lewers &amp; Cooke</i> , 18 Haw. 625.....	130
<i>Atherton v. Pye</i> , 4 T. R. 710 (100 Eng. Rep. 1259).....	79
<i>Awa v. Horner</i> , 5 Haw. 543.....	26, 60
Bacon's Abridgment, Joint Tenants, G.....	68, 76
<i>Baker v. Stewart</i> , 40 Kans. 442.....	64
<i>Bishop of Zeugma v. Paahao</i> , 16 Haw. 345.....	34
2 Bl. Com. 115.....	101, 115
<i>Boeynaems v. Ah Leong</i> , 21 Haw. 699.....	
.....3, 18, 23, 24, 25, 92, 94, 121, 122, 127	
<i>Boegnaems v. Ah Leong</i> , 242 U. S. 612.....	2, 23, 24, 28, 126
<i>Branca v. Makuakane</i> , 13 Haw. 499.....	26, 33, 118
<i>Brown v. Brown</i> , 133 Ind. 476.....	63
<i>Brown v. City of Baraboo</i> , 90 Wis. 151.....	66
<i>Brown v. Spreckels</i> , 18 Haw. 91.....	26
<i>Burnett v. Burnett</i> , 17 S. C. 545.....	30
<i>Calder v. Davidson</i> , 59 S. W. (Tex.) 300.....	105
<i>Campbell v. Manu</i> , 4 Haw. 459.....	26
<i>Cardova v. Folgueras Y. Rijos</i> , 227 U. S. 375.....	27
<i>Cardona v. Quinones</i> , 240 U. S. 83.....	23
Carr, Collateral Ownership, 14, 17.....	67
<i>Carrol v. Reidy</i> , 5 App. D. C. 59.....	63
<i>Chater v. Carter</i> , 20 Haw. 372.....	27
Civil Code of 1859, Sec. XIV, Ch. III.....	25
Civil Code of 1859, Secs. 1447, 1448 (now R. L., 1915, Secs. 3243, 3246).....	25
<i>Clason v. Matko</i> , 223 U. S. 646.....	27
Coke, Litt., Sec. 13.....	115
Sec. 31, p. 27b.....	114, 115
Secs. 283, 284.....	68
Sec. 285.....	61
Coke, Litt., Thomas' Ed., 182b, 183a, 183b.....	68, 76

	Pages
<i>Congdon, In re</i> , 6 Haw. 633.....	26
2 Cord, Married Women, Sec. 1228.....	64
<i>Crary v. Dye</i> , 208 U. S. 515.....	27
<i>Crockett v. Robinson</i> , 46 N. H. 454.....	104
<i>Croxall v. Sherard</i> , 5 Wall. 268.....	100
16 Cyc. 666, 667, 668.....	130
40 Cyc. 1456 .....	83
40 Cyc. 1591-2, 1599-1601.....	81
<i>Damon v. Dickson</i> , 7 Haw. 694.....	109
<i>Daniel v. Whartenby</i> , 17 Wall. 639.....	51
<i>De La Rama v. De La Rama</i> , 241 U. S. 154.....	27
<i>Denn v. Gillot</i> , 2 T. R. 431 (100 Eng. Rep. 232).....	59
<i>De Vaughan v. Hutchinson</i> , 165 U. S. 566.....	51
<i>Dias v. Glover</i> , 1 Hoff Ch. 71.....	65
<i>Doe v. Green</i> , 4 M. & W. 229 (150 Eng. Rep. 1414).....	68, 69
<i>Doe v. Martyn</i> , 8 B. & C. 497 (108 Eng. Rep. 1127).....	116
<i>Duffy v. Jarvis</i> , 87 Fed. 731.....	90
Elphinstone, Interpretation of Deeds, 235.....	59, 63
<i>Elton v. Eason</i> , 19 Ves., Jr. 73.....	110
<i>Evans v. Bishop Tr. Co.</i> , 21 Haw. 74.....	26, 27, 131
<i>Ewing v. Nesbitt</i> , 88 Kan. 708 (129 Pac. 1131, 1134).....	101
<i>Ewing's Heirs v. Savary</i> , 6 Ky. 235.....	62
<i>Fladung v. Rose</i> , 58 Md. 13.....	67
<i>Forrest v. Whitway</i> , 3 Exch. Rep. 366.....	68
Freeman, Cot. & Part., Sec. 72.....	65
<i>Frogmorton v. Wharrey</i> , 2 W. Bl. 728.....	62
<i>Fulper v. Fulper</i> , 54 N. J. Eq. 431.....	63
<i>Gillan's Extrs. v. Dixon</i> , 65 Pa. St. 395.....	65
<i>Godfrey v. Rowland</i> , 16 Haw. 377.....	27, 131
<i>Goodman v. Russ</i> , 14 Conn. 210.....	108
<i>Gossage v. Taylor</i> , Stiles 325.....	62
<i>Green v. Green</i> , 23 Wall. 486.....	51
<i>Hall v. Priest</i> , 6 Gray, 18.....	110
<i>Hamilton v. Hempstead</i> , 3 Day, 332.....	108
<i>Hapai v. Brown</i> , 239 U. S. 502.....	27
<i>Harmon v. Christopher</i> , 34 N. J. Eq. 452.....	62
Hawkins, Wills, *183.....	30
216 .....	83

	Page
<i>Heaseman v. Pease</i> , L. R. 7 Ch. App. Cas. 275.....	125
<i>Hemen v. Kamakaia</i> , 10 Haw. 547.....	36, 81, 83
<i>Henrique v. Paris</i> , 10 Haw. 408.....	26
<i>Hicks v. Cochran</i> , 4 Edw. Ch. 107.....	63, 65
<i>Hiles v. Fisher</i> , 144 N. Y. 306.....	65
<i>Hoag v. Hoag</i> , 213 Mass. 50.....	67
<i>Holt, Estate of</i> , 19 Haw. 78.....	26
<i>Hunt v. Blackburn</i> , 128 U. S. 464.....	63
<i>Hunter v. Watson</i> , 12 Cal. 363.....	30
<i>Huntley's Case</i> , 3 Dyer 326a; Benloe 226; Anderson 21 (73 Eng. Rep. 736; 123 <i>Id.</i> 159 and 332).....	42, 70 76
<i>Idle v. Coke</i> , 2 Salk. 620 (91 Eng. Rep. 525).....	115
<i>Ii Estate, John v. Brown</i> , 235 U. S. 342.....	23, 27
<i>Irvin v. Stover</i> , 67 W. Va. 356.....	77
Jarman, Wills, 5th Ed. 62.....	87, 97
252 . . . . .	68
274 . . . . .	32
359-363 . . . . .	49
411 . . . . .	83
414 . . . . .	41
562 . . . . .	109
1186 . . . . .	62
<i>Jewell v. Warner</i> , 35 N. H. 176.....	102, 117*
2 Jones, R. P., Sec. 1792.....	64
<i>Jones v. Springer</i> , 226 U. S. 148.....	27
<i>Kaleialii v. Sullivan</i> , 23 Haw. 38.....	33
<i>Kaleleonalani v. Crown Land Comm.</i> , 6 Haw. 454.....	27
<i>Kamohai v. Kahele</i> , 3 Haw. 530.....	130
<i>Kapiolani Estate v. Atcherly</i> , 238 U. S. 119.....	23, 27, 122
<i>Kealiiahonui, In re</i> , 9 Haw. 6.....	26
<i>Kealoha v. Castle</i> , 210 U. S. 149.....	27
<i>Keanu v. Kaohi</i> , 14 Haw. 142.....	96
<i>Kendall v. Clapp</i> , 163 Mass. 69.....	41, 42
4 Kent, Com. 133.....	64
<i>Kinney v. Oahu Sugar Co.</i> , 23 Haw. 747.....	
23, 34, 36, 41, 42, 44, 45, 47, 48, 67, 68, 93, 102, 112, 123, 125	125
<i>Knapp v. Windsor</i> , 6 Cush. 156.....	66
<i>Kuuku v. Kawainui</i> , 4 Haw. 515.....	26



<i>Lathrop v. Wood</i> , 1 Haw. 71.....	26
<i>Lewers &amp; Cooke v. Atcherly</i> , 222 U. S. 285.....	23, 27
<i>Lewis v. Herrera</i> , 208 U. S. 309.....	27
<i>Linn v. Alexander</i> , 59 Pa. St. 43.....	81
<i>Luddington v. Kime</i> , 1 Ld. Raym. 203.....	51
<i>Luhrs v. Hancock</i> , 181 U. S. 567.....	27
<i>Luke v. Smith</i> , 227 U. S. 379.....	27
<i>Macauley v. Schurman</i> , 22 Haw. 140.....	117
<i>March, In re</i> , 27 Ch. Div. 166.....	65
<i>Marchant v. Cragg</i> , 31 Beav. 398 (54 Eng. Rep. 1193) ..	64, 66
<i>Martin v. Nahoa</i> , 4 Haw. 427.....	57
<i>McDermott v. French</i> , 15 N. J. Eq. 78.....	63
<i>McDuff v. Beauchamp</i> , 50 Miss. 531.....	63, 67
<i>Merrill v. Baptist Union</i> , 73 N. H. 414.....	104
<i>Minor v. Brown</i> , 133 N. Y. 308.....	63
<i>Montelibano v. La Compania Tabacos</i> , 241 U. S. 455.....	27
<i>Mossman v. Hawaiian Government</i> , 10 Haw. 421.....	26, 123
<i>Nahaolelua v. Heen</i> , 20 Haw. 372.....	
.....3, 18, 23, 27, 34, 92, 94, 95, 117, 121, 126, 127	
<i>Ninia v. Wilder</i> , 12 Haw. 104.....	26, 33, 81
<i>Oxford v. Clifton</i> , 1 Eden, 473 (28 Eng. Rep. 768).....	41
<i>Paiko v. Boeynaems</i> , 22 Haw. 233.....	81
<i>Pearsol v. Maxwell</i> , 68 Fed. 513.....	31, 35, 44, 46, 81
<i>Pearsol v. Maxwell</i> , 76 Fed. 428.....	32
<i>Phelps v. Simmons</i> , 159 Mass. 415.....	62
<i>Phipard v. Mansfield</i> , 2 Cowp. 787 (98 Eng. Rep. 1367) ...	79
<i>Pierson v. Lane</i> , 60 Ia. 60.....	107
<i>Pollock v. Farmers Loan &amp; Trust Co.</i> , 157 U. S. 429.....	123
1 Preston, Estates, 2nd Ed., 131-132.....	63, 64
2 Preston, Estates, 2nd Ed., 425, 427.....	68, 69
<i>Puukaiakea v. Hiaa</i> , 5 Haw. 484.....	26
Revised Laws Hawaii, 1915, Sec. 1.....	25, 116
Sec. 3132 . . . . .	60
<i>Robinson v. Aheong</i> , 13 Haw. 196.....	26, 33, 42, 60, 90
<i>Rooke v. Queen's Hospital</i> , 12 Haw. 375.....	
2, 16, 17, 25, 27, 33, 38, 42, 81, 83, 90, 98, 101, 104, 112, 117	
<i>Rowland v. Warren</i> , 10 Or. 129.....	81, 106

	Page
<i>Shelley's Case</i> .....	
42, 52, 77, 82, 88, 89, 90, 91, 103, 104, 105, 107, 109, 110, 119	
1 Shep. Touch. 112.....	63
2 Shep. Touch. 445-6.....	74
<i>Simerson v. Simerson</i> , 20 Haw. 57.....	27, 95
<i>Smith's Appeal</i> , 23 Pa. St. 9.....	35, 111
<i>Snyder v. Baker</i> , 5 Mackey (D. C.) 443.....	46
<i>Spreckels v. Brown</i> , 212 U. S. 208.....	26, 27
<i>St. John v. Dann</i> , 66 Conn. 401.....	108
<i>Statcup v. Statcup</i> , 137 N. C. 305.....	63
<i>Stones v. Heurtly</i> , 1 Ves. Sen. 165.....	62
<i>Stuckey v. Keefe's Extrs.</i> , 26 Pa. St. 397.....	64
<i>Tanner, Ex parte</i> , 20 Beav. 374 (52 Eng. Rep. 647)....	66, 70
<i>Tiedemann, R. P.</i> , Sec. 244.....	64
1 <i>Tiffany, R. P.</i> , Sec. 165.....	64
Secs. 62, 64, 329.....	81
<i>Thornburg v. Wiggins</i> , 135 Ind. 178.....	67
<i>Thurston v. Allen</i> , 8 Haw. 392.....	26, 27, 33, 42, 90
2 <i>Underhill, Wills</i> , Sec. 536.....	68
650 .....	81
654 .....	118
<i>Vicks v. Edwards</i> , 3 P. Wms. 373.....	62
1 <i>Vict.</i> , Ch. 23, Sec. 29.....	80, 85
<i>Vida, In re</i> , 1 Haw. 63.....	26
<i>Viner's Abridgment, Jointenants</i> , L 36.....	68
1 <i>Washburn, R. P.</i> , 6th Ed., Sec. 914.....	64
3 <i>Washburn, R. P.</i> , 6th Ed., Secs. 2115, 2118.....	57
<i>Weld v. Williams</i> , 13 Metc. 486.....	100
<i>Whiting v. Whiting</i> , 4 Conn. 179.....	108
<i>Wild's Case</i> , 6 Rep. 17.....	39
<i>Wills Act (English)</i> 1837.....	83, 85
<i>Wilkins v. Young</i> , 144 Ind. 1.....	63
1 <i>Williams, R. P.</i> , 21st Ed. 253.....	100
<i>Wilson v. Frost</i> , 186 Mo. 311.....	64, 67
<i>Wood v. Ladd</i> , 1 Haw. 17.....	26
<i>Work v. United Globe Mines</i> , 231 U. S. 595.....	27
<i>Wright v. Holford</i> , 1 Cowp. 31 (98 Eng. Rep. 951).....	79
<i>Young v. Southern</i> , 2 B. & Ad. 628 (108 Eng. Rep. 1276) ..	62

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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HELEN K. KINNEY,  
*Plaintiff in Error,*

VS.

OAHU SUGAR COMPANY,  
LIMITED, a Corporation,  
*Defendant in Error.*

In Error to the  
Supreme Court of  
Hawaii.

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## BRIEF FOR DEFENDANT IN ERROR.

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### STATEMENT OF THE FACTS AND CONTENTIONS.

Notwithstanding the camouflage, sophistry and inaccuracies with which the plaintiff's brief abounds, the case is really very simple.

The principal questions on the merits are:

(1) Would the devise "unto Kahakuakoi and Kealohapauole and to the heirs of the body of either," taken by itself and in connection with the other parts of the will and codicils, create a life estate in the first takers and a remainder in fee simple in the heirs of their bodies, as contended by the plaintiff, or a fee tail in the first takers, as contended by the defendant, if a fee tail could exist in Hawaii; and

(2) If it would create a fee tail, in case a fee tail could exist in Hawaii, then, since, as held in *Rooke v. Queen's Hospital*, 12 Haw. 375, a fee tail (and also a fee simple conditional) cannot exist in Hawaii, should the estate be held to be a life estate and remainder, as contended by the plaintiff, or a fee simple, as contended by the defendant?

Both the Circuit Court and the Supreme Court of Hawaii held that the estate would be a fee tail, if a fee tail could exist in Hawaii, and that, since a fee tail (and also a fee simple conditional) cannot exist in Hawaii, it would be a fee simple. These holdings, we submit, are absolutely impregnable.

Besides the foregoing two questions we present two others. We contend:

(3) In part I of our argument, that the decision of the Supreme Court of Hawaii is of such a local nature that it should be affirmed on the authority of *Boeynaems v. Ah Leong*, 242 U. S. 612, without going into the merits; and

(4) In part VI of our argument, that, even if the estate should be held to be a life estate and remainder, the plaintiff could not recover at this time, because the defendant would still have the right of possession under a lease.

A decision of (3) for the defendant would render unnecessary a decision of (1), (2) and (4). A decision of (1) and (2) for the defendant would render unnecessary a decision of (3) and (4).

On the main questions, (1) and (2), on the merits, we contend, in part II of our argument, that the use



of the aptest technical words, all applicable presumptions, the frame of the sentence and the will and codicils taken as a whole, combine to make the strongest possible case for an estate tail; in part III, that the word "either" and the devise over "upon default of issue," which are relied on by the plaintiff in support of her theory of a life estate and remainder, not only do not support that theory but actually add support to our theory of an estate tail; in part IV, that on principle and by unanimity of authorities elsewhere both in cases precisely in point and in analogous cases, as well as by Hawaiian case and statute law (subject to one qualification immaterial to this case), an estate which would be an estate tail in any particular jurisdiction, if an estate tail could exist there would be a fee simple, if an estate tail (and a fee simple conditional) could not exist there; and in part V that the Hawaiian cases of *Nahalelua v. Heen*, 20 Haw. 372, and *Boeynaems v. Ah Leong*, 21 Haw. 699, which plaintiff's counsel attempts to distort, and upon which as so distorted he relies to show that in Hawaii an estate which would be an estate tail, if such an estate could exist there, would in all cases be a life estate and remainder, since an estate tail cannot exist there, not only do not show that, but on the contrary, support our contention that in this case the estate should be held to be a fee simple in the first takers.

We regret that we cannot pass at once to the argument, but so full of the "camouflage, sophistry and inaccuracies" above referred to is the plaintiff's brief that we feel compelled, in fairness to the court as well

as to ourselves and the lower courts, to refer to a few of the more illustrative and flagrant instances.

Before taking up some of the more serious matters permit us to correct the quotation of the 5th item of the will as set forth on page 2 of opposing counsel's brief. In the clause "I also devise unto them and to the heirs of the body of either," he has interpolated a comma between "them" and "and"; and in next to the last line he has omitted "the same" after "issue." These errors doubtless are due to inadvertence, although attention was called to them in the lower courts, where the same mistakes were made.

Again, in his restatement of the devise in his own way on page 75 of his brief he introduces language from the preceding bequest as if it were a part of the devise in question, saying "The objects of the testatrix's bounty are made clear by the language of the devise, which is 'unto them,' that is to say, '*unto*' Kahakuakoi and Kealohapauole 'and *to the* survivor of them \* \* \* so long as *either* of them may live' '*and to the* heirs of the body of *either*' '*upon* default of issue, the same *to go to my trustees*'." The words "and to the survivor of them \* \* \* so long as either of them may live" belong to the preceding bequest and are not found in the devise in question. Incidentally in this connection it may be added that, as held by the Supreme Court (Tr., pp. 50-51), the fact that the preceding bequest was only for life, not only does not indicate that the devise in question also was only for life, but on the contrary indicates, be-

cause of the difference in phraseology, that the devise was not intended to be merely for life.

Throughout his brief, opposing counsel misstates both our contentions and the decisions of the lower courts. On pages 7 and 8 of his brief he purports to state our contentions as made by us and on pages 9 and 10 he purports to restate them as he would conceive them to be in effect. We utterly repudiate these. For instance, on page 7 he says that we contend "(1) That Kahakuakoi (w) and Kealohapauole (k) took under the devise two estates" and, at page 9, that we contend that "1. Ka. and Ke. took a life estate by the entirety," and, on the same page, that we contend that "4. Estates tail by way of cross remainder would be created in the respective heirs of the body of Ka. and Ke. on failure of the heirs of the body of either." He continues (page 10): "The claim of the defendant was not sustained by the Circuit Court which apparently decided the case on the theory that at common law an estate tail could be docked by the tenant's conveyance, an obvious error, but was sustained by the Supreme Court of Hawaii," and (page 11) "It will be seen that under the claims of both parties and under the decision of the Supreme Court of Hawaii, the immediate estate is a life estate by the entirety in the first takers." Similar statements in substance are made elsewhere in the brief—apparently for the purpose of making the lower courts and ourselves appear to take in large part opposing counsel's view in regard to a life estate in the first takers. Somewhat similarly and for the same purpose he re-

iterates that the lower courts found that the testatrix did not intend to create a fee simple. See, for instances, pages 21 and 87 of his brief.

Now, the fact is that, throughout, both the lower courts and we have taken the position that the first takers did not take two estates, that they took only one estate (a fee tail, if a fee tail could exist, otherwise a fee simple) that they did not take a mere life estate, and especially that the heirs of their bodies would not in any event take remainders, whether cross or direct, but would take, if at all, only by descent. Moreover, the Circuit Court did not decide the case on the theory that at common law an estate tail could be docked by the tenant's conveyance, but on that point held merely that since the estate became a fee simple because it could not exist as an estate tail, it could be conveyed by deed, as was done in this case. Further, although both the lower courts found (as we also contended) that the testatrix did not intend to create a fee simple, they found equally (as we also contended) that she did not intend to create a life estate and remainder, because she intended to create a fee tail. But what they and we emphasized was, not that she did not intend to create a fee simple, but that she did intend to create an estate of inheritance (a fee tail) and did not intend to create a life estate and remainder.

Opposing counsel relied principally on the use of the word "either" to show that the first takers took only a life estate and that the heirs of their respective bodies would take cross remainders.



We contended that the obvious effect of the word "either" was to show that the first takers took a fee tail general (the heirs of the body of each, whether by the other or by some other spouse), and not a fee tail special, as would be the case if the heirs of the body were confined to those of the joint bodies. In this, the Supreme Court agreed with us (Tr., p. 49). The Circuit Court did not find it necessary to express an opinion upon it.

We contended further that if "either" had any other effect, it would be merely to make the inheritances of the first takers several instead of joint, just as might be the case if "each" or "respectively" had been used instead of "either." If "either" did not have this effect, the first takers would have a fee tail (if a fee tail could exist, otherwise a fee simple) by the entirety throughout. If "either" did have this effect, it would affect in that respect only the inheritances, so that the fee tail (or fee simple) would remain joint (that is, by the entirety) for the period of the joint lives and be several thereafter. We took the position that it was immaterial whether "either" had this effect or not, because in either case the estate would be a fee tail (or fee simple) in the first takers, and the only difference would be that in the one case the fee (whether tail or simple) would be held jointly all of the time and in the other case would be held jointly during life and severally thereafter. If the first takers had not been husband and wife, they would have held severally (in common) all the time.

Opposing counsel cunningly endeavors to confuse

estates in respect of duration with the mere manner of holding them. A fee tail or fee simple may be held part of the time jointly and the rest of the time severally without being a life estate and remainder in the usual sense, and, of course, without there being anything in the nature of cross remainders. If, for convenience, the estate in such case may be spoken of as a life estate and remainder, as is sometimes done, it must be remembered that the remainders not only are not cross remainders but that they are in the same persons that have the life estate and not in the heirs or heirs of the body at all.

There were only three possibilities. In any case the estate would be a fee (whether tail or simple) in the first takers, but that fee might be held (1) jointly all the time or (2) severally (in common) all the time or (3) jointly part of the time and severally the rest of the time. There could be no fourth possibility in a case like this, namely, a life estate in the first takers and a remainder in fee in the heirs. All agree that in this case the first takers would hold jointly (by the entirety) at least during their lives. The only question is whether they would hold jointly or severally the rest of the time, and that is entirely immaterial for the purposes of this case. We are inclined to think that they would hold jointly throughout. The Circuit Court seemed to assume this without saying so. The Supreme Court thought that if "either" had any other effect than to make the estate a fee tail general instead of special, it would be the effect referred to of making the inheritances several but that it was immaterial

for the purposes of this case whether it would have that effect or not.

If the fee was to be held jointly (by the entirety) throughout, the result would be that on the death of one of the first takers, the survivor alone would have the fee and upon the death of the survivor it would descend to the survivor's heirs alone, if it had not been disposed of. If, on the other hand, the fee was to be held jointly for life and severally thereafter, the result would be that on the death of one of the first takers, the survivor alone would hold until his death and then his half would pass to his heirs and the other half would pass to the other's heirs; the estate of the other's heirs would be in abeyance after the other's death until the death of the survivor; another way of describing the estate is to say that the first takers took a fee as tenants in common subject to holding jointly during their lives. If, in the third place, the fee was to be held in common throughout, upon the death of each of the first takers, his or her half would descend to his or her heirs, and the heirs of the body of the one first dying would not have to wait until the death of the other.

Upon the foregoing we invite special attention to this language of the Circuit Court (Tr., pp. 34, 36) :

"I am irresistibly led to the conclusion that the testatrix meant to give to Kahakuakoi and Kealohapauole something more than a life estate. She meant to give them an estate of inheritance. I am of the opinion that she intended to create an estate in fee tail. In that she was thwarted by the law of Hawaii, which has declared that no

such estate exists in Hawaii. The nearest we can approach, therefore, the intention of the testatrix (having decided that she did not intend to create a life estate in Kahakuakoi and Kealohapauole) is to declare the estate which she did create a fee simple.

"I am not, by so declaring, intending to hold that the testatrix intended to create in Kahakuakoi and Kealohapauole a fee simple estate. It is plain that the testatrix knew well how to create such an estate. I am holding merely that the words she used must be interpreted to create such an estate; that her apparent intention is not enforceable under the law of Hawaii; that the nearest we may arrive at that intention is to declare that the devise did create a fee simple.

\* \* \* \* \*

"If, therefore, a fee simple was created, the mortgage, the sale thereunder, the purchase by Charles R. Bishop, and the mesne conveyances through the defendant, are all legal, and the decision and judgment must be for the defendant."

And the following passages from the decision of the Supreme Court, which, after stating the contentions of counsel and discussing the language of the will and codicils, said:

"We must hold, therefore, that the intention of the testatrix was to create in the devisees an estate of inheritance—an estate in fee tail—unless we find words in the will which clearly show that the testatrix meant something else." (Tr., p. 48.)

The court then referred to the matters relied on by opposing counsel to show a life estate and remainder, and particularly the word "either," and continued:

"But we think the conclusion reached by counsel is not sound. The word 'either' does not refer



to (in the sense of affect) the first takers or necessarily affect the estate devised to them. It relates only to the inheritance. There is no legal obstacle to the creation of a joint estate in fee tail or fee simple with several inheritances. (Citing authorities.) And we see no reason why the principle should not apply in the case of an estate by the entirety in tail. It is really of no practical importance in this case whether the first takers be regarded as having been tenants by the entirety, joint tenants or tenants in common, and as this case does not involve a controversy between two different sets of heirs of the first takers it is a matter of academic interest only as to how the heirs of one spouse who were not also heirs of the other, had there been such, would have taken. We think, however, that the contention of counsel for the defendant in error that without the words "of either" the descent would have been limited to the heirs of the joint bodies of the first takers, thus creating an estate tail special, and that that word was used to express the intention to create an estate tail general is sound. Under this theory the right of possession of the separate heirs of the spouse first dying, if any, would merely be in abeyance during the life of the surviving spouse." (Tr., p. 49.)

The Supreme Court then, after discussing other matters relied on by opposing counsel, said:

"We conclude, therefore, that there is no language in the will which shows that the testatrix used the words 'heirs of the body' in any other than their usual and technical sense. On the other hand, there is affirmative evidence tending to show that the testatrix did not mean that Kahakuakoi and Kealohapauole were to have an estate for life only." (Tr., p. 51.)

The court then proceeded to refer to such affirmative evidence. Opposing counsel takes exception (see his brief, pp. 10-11, 25-26) to the statement of the court to the effect that it is only a matter of academic interest how the heirs of one spouse who were not also the heirs of the other would take. He contends that the court should have considered all possibilities. In the first place, the court did consider this very possibility, namely, that "either" might have the effect of making "heirs of the body" include heirs of each as well as heirs of the joint bodies, so far as that was necessary for the construction of the devise. In the second place, while it was unnecessary for the court, after having arrived at the construction of the devise as giving a fee to the first takers, to proceed to say just how imaginary heirs that did not exist and never could exist might take if the first takers had not disposed of their fee, the court did in fact proceed to say how such heirs would take if they existed and had a chance to take. (See quotations above.)

Opposing counsel indeed throughout his brief misstates the decision of the Supreme Court of Hawaii as well as our own argument. For instance, in next to the last paragraph of his brief he states that the Supreme Court "holds that the testatrix should be presumed to have intended an illegal estate rather than a legal estate." What could be farther from the fact? (See Tr., pp. 51-52.)

We commend to the court the decision of the Supreme Court as a more than usually full, clear and

convincing opinion, and, without specifying other instances of misstatement, we respectfully ask the court to look to that decision and to our brief, rather than to opposing counsel's brief, for what the court decided and what we contend.

As to the facts or "surrounding circumstances," counsel for the plaintiff says that the Supreme Court gave no weight to these although the Circuit Court ascribed importance to them—particularly the dependence of the beneficiaries on the testatrix's bounty and their relationship to her. See, for instance, page 27 of his brief. As matter of fact, the Supreme Court did consider these. (Tr., p. 53.) But it evidently was of the opinion that, if these were of such a nature as might throw some light on the question under other circumstances, the will and codicils were drawn with such "care and accuracy of expression" by one of Hawaii's most eminent lawyers (Tr., p. 45) and so clearly left "no doubt as to what the testatrix intended" (Tr., p. 52), they (the surrounding circumstances) could have no effect in this case. The court cannot make a will for the testatrix. And that is precisely the view taken by the Circuit Court also. (Tr., pp. 31-32.) If counsel wished to raise this point, he should not only have made an assignment of error specifically covering it but he should have brought up the evidence in the case. This was peculiarly a matter for the lower courts, which had the evidence before them.

The record, however, so far as it goes, and much more so the evidence not brought up, so far from

favoring a life estate and remainder, favors, we submit, a fee in the first takers. Plaintiff's counsel refers to the matters of dependence and relationship more particularly at pages 1, 4, 65, 74 of his brief. These might account for the fact of the bequest and devise to these people, as similar facts might account for almost any bequest or devise, but they do not throw light on what sort of a devise the testatrix intended to make, unless indeed they favor a fee in the first takers.

Kahakuakoi, one of the first takers, her husband being the other, was only distantly related to the testatrix. No one knew precisely how. She and her husband were servants and retainers of the testatrix and lived on her premises with many other servants and retainers. But they were Hawaiians of the old-fashioned good, faithful sort. Naturally the testatrix wished to make some provision for them. And yet she gave them even less than she gave some of her servants. She gave them a bequest of \$30 a month and the land in question, which then yielded \$14-7/12 a month (\$175 a year), a total of \$44-7/12 a month or \$22.29 each, less taxes, etc. Some of the servants received more. See, for instance, item 6 of the will. These devisees could make such provision for their children as they pleased.

On the other hand, the heirs of their bodies were an uncertain, fluctuating class. Most of their children had died. There were four then living. Some or all of these might die before their parents, as their rate of mortality was great. One of them, born shortly before



the will was made, died shortly after the testatrix died. Another, the plaintiff's mother, through whom the plaintiff claims, died long before her parents. Other children might be born and might die. Plaintiff's counsel says (brief, p. 65) that such was the case. The testatrix had had somewhat to do with one of the children, Niulii, plaintiff's mother; less to do with another, Lydia; and nothing to do with still others, George and those who died after the will was made. She made no distinction between these. The one with whom she had the most to do, the plaintiff's mother, was a most wayward girl and a great trial to the testatrix, one of whose maids she was for a time until the testatrix could stand her escapades no longer, when she put her in a boarding school, as she did many other girls.

The plaintiff's own theory was that shortly before the plaintiff's birth, the testatrix finding the plaintiff's mother, Niulii, about to give birth to the plaintiff, compelled her to marry one of the many reputed fathers of the child, a common Hawaiian, much older than Niulii (who was only about 15 or 16 years old), a divorced husband, of unknown parentage, reared by a Chinaman, and whose occupation was that of a cook, valet and general house servant. If Niulii had lived and taken a fee simple in remainder she could and doubtless would have disposed of it and the plaintiff would have taken nothing. (See Tr., pp. 19, 24, 26-28, 77-78.)

Not quite all of this appears in the record in this court, but all and more appeared in the evidence, and

enough appears in the record here. If we have gone too far in stating some details not in the record in this court, we at least have come short of stating, as counsel for the plaintiff has done, matters that were not even in the evidence in the court below. All of which demonstrates the absurdity of asking this court to revise the opinions of the lower courts as to the "surrounding circumstances". The record certainly discloses nothing upon which the court could base a conjecture, if a conjecture were permissible, that the testatrix would probably have preferred to give the heirs of the body a fee simple in remainder and the parents only a life estate rather than give the parents a fee tail. The facts, if anything, favor the latter.

Plaintiff's counsel essays also to present facts from which he would have it inferred that the testatrix could not have intended to create an estate tail. He says that the testatrix could not have intended an estate which the court said in the *Rooke* case had never been recognized in Hawaii, and was inconsistent with Hawaiian law, which the testatrix had presumably never heard of and which her attorney, who drew the will and codicils presumably knew could not exist in Hawaii, and that this is shown by the history of this title, and especially as the testatrix was the last of the Kamehamehas and a typical Hawaiian. (His brief, pp. 27, 36-43, 66-72.)

True, the testatrix was a typical Hawaiian—in the sense that she was probably the highest type of Hawaiian in culture and knowledge and wisdom that ever lived, and she undoubtedly had heard of estates

tail. The will itself shows this also. If she had not heard of them under that name, which is highly improbable, that would not preclude the idea of an intention to create one, that is, to give a fee limited to the heirs of the body. Anyone familiar with Hawaiian wills and conveyancing knows how often the Hawaiians attempt to limit alienations and descents. The attorney, Judge Hatch, who drew the will and codicils (which are in his handwriting) then a leader of the Hawaiian bar and afterwards a Justice of the Supreme Court (Tr., p. 45), undoubtedly did not know that estates tail could not exist in Hawaii, but on the contrary evidently believed they could exist there. His drafting of the devise in question is susceptible of no other explanation.

No one at that time knew or apparently even supposed that estates tail could not exist there. That was not known until the decision in the *Rooke* case sixteen years later, and that was one of the most hotly contested and exhaustively considered cases ever tried in Hawaii. It was strenuously urged in that case by able counsel that estates tail could exist in Hawaii. And, outside of many members of the local bar, opinions by John Gray of Boston and Sir Howard Elphinstone of England were obtained. These opinions are referred to in the decision.

It is true that, as the court said in that case, estates tail had not been recognized, that is, judicially or by statute, in Hawaii, but that was not deemed in that case any reason for holding that the testator did not intend an estate tail, any more than the same court of

different personnel later took a similar view in the *Nahaolelua* and *Boeynaems* cases, and both the Circuit and Supreme Courts had no hesitation in holding in the present case that the testatrix intended to create an estate tail. That has been true also in many other jurisdictions to be referred to in part IV of this brief, where again and again wills and deeds have been made on the theory that estates tail were lawful, only to have it decided after full investigation at a later date that such was not the case—in the opinion of the court.

In the present case, the Supreme Court said that an impression seems formerly to have prevailed that fees tail could exist in Hawaii. This statement is supported by the history of the title in question. Kaha-kuakoi and Kealohapauole evidently thought they had more than a life estate. They leased the land to Mr. Robinson in 1890, six years after the testatrix died, for a term of fifty years, to begin upon the expiration of an existing lease, January 1, 1892. They evidently thought also not only that they were the only devisees but that their estate was a fee tail and that the entail could be barred by deed, because later in the same year, 1890, they mortgaged the land in fee simple to the bank of Bishop & Co., principally owned by the testatrix's husband, Charles R. Bishop, and in that mortgage described the land as "being the same premises devised *to us* by Will of B. Pauahi Bishop", and stated that the land was conveyed "freed and discharged from any *estate tail* of us and all remainders, estates and powers to take effect after the determination or in defeasance of such *estate tail*". Mr. Bishop,



the testatrix's husband, also evidently thought an estate tail could be and was created, and that the entail could be barred by deed, because he accepted this mortgage and loaned \$3,000 on its security, which was about all that the land was then worth, and later, in 1893, on foreclosure of the mortgage, he bought the land for \$4,700. (Tr., pp. 76, 93.) This mortgage would seem also to confirm the view that Judge Hatch understood that the estate was an estate tail, because as attorney for the bank he presumably drew or passed upon the mortgage.

Counsel for the plaintiff also endeavors to make capital out of the fact that Mr. Robinson paid Mr. Bishop only \$6,000 for the land and then obtained only a conveyance without warranty, and before buying obtained a quitclaim deed, the day before, from Kaha-kuakoi and Kealohapauole and their children, Lydia and George, but afterwards conveyed with warranty to the defendant for \$150,000 in stock. (See particularly page 73 of his brief.)

But Mr. Robinson was justified in obtaining the quitclaim deed from the devisees and their children as a matter of business precaution to guard against possible flaws in the foreclosure proceedings or even against the possibility of its being held that the entail could not be barred by mortgage deed or the possibility that it might be held that estates tail could not exist or to guard against claims of this sort being made, however unfounded they might be. This would not show that any one thought that the testatrix did not intend to create an estate tail. It would rather

show the opposite. And the fact that the devisees and their children were ready to give a release of their possible rights for five dollars, shows that they considered that all their interests, whatever they were, had passed under the mortgage and its foreclosure.

What the plaintiff and her relatives thought of their title is shown further by the fact that in 1906, her brother, John Paalua, since deceased, and through whom she claims in part, and again in 1914, he and George gave for \$1 an option to the plaintiff and her husband respectively to purchase their interests for \$1,000. (Tr., p. 77.) The fact is also that Mr. Robinson paid Mr. Bishop the then full value of the land, \$6,000, in 1894.

Plaintiff's counsel insinuates also that Mr. Robinson was willing to give a warranty deed because he thought that the plaintiff, who did not join in the release, was illegitimate, and that the defendant was willing to pay Mr. Robinson so much because of the warranty; also that the \$150,000 of stock was worth several times its par value, and that the land was really worth that much and that the plaintiff and her uncle and aunt have been relieved of their land for a song.

The fact is that the plaintiff was then a little girl and her parents were dead and there is nothing in the record here or in the evidence, which is not here, to show that Mr. Robinson ever heard of her until twelve years after he bought the land. The fact is also that the land, when Mr. Robinson bought it in 1894, was worth no more than he paid for it, \$6,000,

that it was worth when Mr. Bishop bought it in 1893 no more than he paid for it, \$4,700, and that in 1873 Mrs. Bishop originally bought it and many other more valuable lands together for \$300, when there was no possible question about the title. (Tr., p. 75.) When Mr. Robinson bought he already held a 50-year lease of the land at an annual rental of \$700, a preceding lease at \$175 having expired shortly before. That would not indicate that the land was very valuable.

The value of land then was usually estimated at eight times the annual rental, and this is still often the case. As to the consideration which he received for his conveyance to the defendant, \$150,000 in stock, which, instead of being several times that value, was of such uncertain value that no sugar agency in Hawaii could be induced to float the company, it was fully explained by the evidence below, which showed, among other things, that, as the deed itself shows (Tr., p. 99) the consideration which Mr. Robinson received was based in large part on the improvements which he had placed on the land. And what could be more ridiculous than that the defendant gave the large consideration because of the warranty! Would the defendant pay that consideration by way of insurance of a defective title, getting that insurance only by way of an individual's covenant of warranty, and then, too, proceed to place, as the evidence below shows, upwards of \$600,000 of improvements on the land in the shape of artesian wells and pumping plants (Tr., p. 77), besides intending, as the evidence below shows, to put a million-dollar or so mill on the land. The evi-

dence below also showed that no question as to the validity of the title was raised when the defendant bought the land and that the defendant did not know of the existence of the plaintiff or her claim until many years later. All which goes to show that the plaintiff is in no position to ask this court to disturb the decision below on the facts, which the lower courts had before them and which this court can only conjecture.

If any inference is to be made from the facts, it would seem to be that the court should be slow to support such a claim as is now set up by the plaintiff as against a title which has been so long unquestioned and in reliance upon which the defendant and its predecessor in title have expended in improvements probably at least three quarters of a million dollars.

Apologizing for the length to which we have felt constrained by plaintiff's brief to go in clearing the way, we now proceed to the argument of the real questions in the case.

## ARGUMENT.

### I.

THE JUDGMENT BELOW SHOULD BE AFFIRMED UPON THE AUTHORITY OF *BOEYNAEMS* v. *AH LEONG*, 242 U. S. 612.

Before the comparatively recent transfer of jurisdiction, from the Federal Supreme Court to this court, of appeals and writs of error from the Supreme Court of Hawaii in certain classes of cases, the Federal Supreme Court had held in a long series of cases



from Hawaii as well as from Porto Rico and other jurisdictions that, except in a clear case of error, it would not disturb the judgments of local courts in cases which depend largely upon local statutes, history, usage, experience or understanding; and in the recent case of *Boeynaems v. Ah Leong*, 242 U. S. 612, that court not only reaffirmed this rule but held in the most emphatic way that it applied to that case, so much so that the court in its decision did not refer to the merits of the case at all and affirmed the judgment of the Supreme Court of Hawaii solely on the ground that it was of a local nature. The entire decision of the Federal Supreme Court was as follows:

“Judgment affirmed with costs upon the authority of *Lewers & Cooke v. Atcherley*, 222 U. S. 285, 294; *John Ii Estate v. Brown*, 235 U. S. 342, 349; *Kapiolani Estate v. Atcherley*, 238 U. S. 119, 136; *Cardona v. Quinones*, 240 U. S. 83, 88.”

The cases cited and the passages on the particular page referred to in them show that the court disposed of the case solely upon this view. A petition for rehearing for the purpose of having the merits considered was denied.

The *Boeynaems* case in the Supreme Court of Hawaii (21 Haw. 699), which, as already stated, merely followed the *Nahaolelua* case (20 Haw. 372) was, as we view it, precisely like the present case (23 Haw. 747) in this respect, and therefore the decision of the Federal Supreme Court in that case is, we submit, controlling in this case. The same questions were involved in that case and in this. First,

would the estate (conveyed in that case, devised in this) be an estate tail in Hawaii, if such an estate could exist in Hawaii? In each case this question was decided in the affirmative. Secondly, since estates tail cannot exist in Hawaii, would the estate be a fee simple or a life estate and remainder? In each case this question was decided by the application of the same principle, namely, that the estate would be a fee simple or a life estate and remainder according to which would go more nearly towards carrying out the intention of the grantor or testator. The court held in one case that the estate would be a life estate and remainder and in the other that it would be a fee simple because of the difference in the facts to which this principle was applied. In both cases the same local statutes, history, usage, experience and understanding were involved and the same principles were applied, the court coming to opposite conclusions in the two cases solely because of the difference in the facts. The present case is the stronger of the two for the application of the rule against disturbing decisions of a local nature, because, as we propose to show, the decision in this case is supported by all applicable and analogous decisions in other jurisdictions, while the decision in the *Boeynaems* case finds no support in any other jurisdiction.

In the *Boeynaems* case in the Federal Supreme Court the attorney who successfully urged that the decision below should not be disturbed because of its local nature was the same attorney who in the present case seeks to have the decision below reversed. In

his printed brief, filed in the Federal Supreme Court in that case, he based his argument in part upon local statutes, in part upon local decisions, and in part upon decisions of the Federal Supreme Court supporting the rule against disturbing decisions of a local nature.

The local statutes referred to by him in that brief were: (1) Section IV of Chapter I of the Act of 1847, which provided that "The reasoning and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this Kingdom," and Section XIV of Chapter III of the Civil Code of 1859, which authorized the courts to decide according to reason and equity and provided that "to decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries," which provisions were in force when the deed involved in the *Boeynaems* case and the will involved in the present case were made; (2) the Act of 1892 (now Revised Laws of Hawaii, 1915, Sec. 1, enacted after the deed and will were made), which adopted the common law "except as otherwise \* \* \* fixed by Hawaiian judicial precedent, or established by Hawaiian usage"; and (3) Sections 1447 and 1448 of the Civil Code of 1859 (now Revised Laws, 1915, Secs. 3243 and 3246) prescribing the course of descent of property from intestates, which were relied on mainly in *Rooke v. Queen's Hospital*, 12 Haw. 375,

391-392, for holding that estates tail cannot exist in Hawaii.

The Hawaiian decisions referred to by him were those intended to show how far the courts of Hawaii had gone in basing their decisions on local usage and conditions and which held in particular that a seal is not necessary to the validity of a mortgage or a deed (*Wood v. Ladd*, 1 Haw. 17; *Campbell v. Manu*, 4 Haw. 459), or a bond (*In re Congdon*, 6 Haw. 633); that dower may be had in leasehold estates of long duration (*In re Vida*, 1 Haw. 63); that future estates may be conveyed (*Kuuku v. Kawainui*, 4 Haw. 515, 517; *Puukaiakea v. Hiaa*, 5 Haw. 484, 486); that the words "heirs" and "assigns" are not strictly necessary to carry a fee simple (*Branca v. Makua-kane*, 13 Haw. 499, 504, 505); that a conveyance to two or more in the absence of a contrary intention created a tenancy in common (*Awa v. Horner*, 5 Haw. 543); that the rule in Shelley's case is not in force in Hawaii (*Thurston v. Allen*, 8 Haw. 392; *Robinson v. Aheong*, 13 Haw. 196; *Estate of Holt*, 19 Haw. 78; *Evans v. Bishop Trust Co.*, 21 Haw. 74); that conveyances may be made in disseisees (*In re Kealiiahonui*, 9 Haw. 6; *Mossman v. Hawaiian Government*, 10 Haw. 421; *Ninia v. Wilder*, 12 Haw. 104; *Brown v. Spreckels*, 18 Haw. 91; *Spreckels v. Brown*, 212 U. S. 208); that choses in action and rights of entry are assignable and livery of seisin unnecessary (*Lathrop v. Wood*, 1 Haw. 71; *Henrique v. Paris*, 10 Haw. 408); that contingent remainders will not in all cases be defeated through the merger of estates



(*Evans v. Bishop Trust Co.*, 21 Haw. 74; *Godfrey v. Rowland*, 16 Haw. 377); that fees tail and fees simple conditional do not exist in Hawaii (*Rooke v. Queen's Hospital*, 12 Haw. 375); and that the tendency is to reject English rules of property if not in accord with the times and to follow the intent of the testator or grantor (*Rooke v. Queen's Hospital*, 12 Haw. 375; *Thurston v. Allen*, 8 Haw. 392; *Simerson v. Simerson*, 20 Haw. 57; *Chater v. Carter*, 22 Haw. 34; *Nahaolehua v. Heen*, 20 Haw. 372; *Kaleleonalani v. Crown Land Commissioners*, 6 Haw. 454).

The cases cited by him in support of the rule of the Federal appellate courts against disturbing a decision of a local nature were: *Spreckels v. Brown*, 212 U. S. 208; *Lewers & Cooke v. Atcherley*, 222 U. S. 285; *Kapiolani Estate v. Atcherley*, 238 U. S. 119, 136; *De la Rama v. De la Rama*, 241 U. S. 154; *Montelibano v. La Compania Tabacos*, 241 U. S. 455; *Cardova v. Folgueras Y. Rijos*, 227 U. S. 375; *Work v. United Globe Mines*, 231 U. S. 595, 600; *Luhrs v. Hancock*, 181 U. S. 567, 571; *Kealoha v. Castle*, 210 U. S. 149; *Luke v. Smith*, 227 U. S. 379; *John Ii Estate v. Brown*, 235 U. S. 342; *Hapai v. Brown*, 239 U. S. 502; *Jones v. Springer*, 226 U. S. 148; *Lewis v. Herrera*, 208 U. S. 309; *Grary v. Dye*, 208 U. S. 515; *Clason v. Matko*, 223 U. S. 646.

We present this resumé of opposing counsel's argument in that case, partly in order to show precisely the argument upon which the Federal Supreme Court based its decision in that case and that there is no difference between the two cases in this respect, and

partly in order to adopt the argument as an equally persuasive argument to this court.

The argument to show that the present case is of a "local nature" is greatly strengthened by much that opposing counsel states in his brief in this case (see particularly pages 16-21, 36-43 of his brief), which *mirabile dictu*, he states for the avowed purpose of inducing this court to revise the decision of the local court especially as to the matters which are of a local nature.

We submit therefore (1) that the decision of the Federal Supreme Court in the *Boeynaems* case is precisely in point and controlling in the present case, to the effect that the decision below is such that it should not be disturbed, and (2) that, even if this court should not regard that decision as absolutely controlling in this case, it should nevertheless itself apply to this case the rule against disturbing decisions of a local nature except in the clear case of error and should give great weight to the decision of the local court.

## II.

ALL PERTINENT CONSIDERATIONS COMBINE TO SHOW THAT THE DEVISE IN QUESTION WOULD CREATE A FEE TAIL IF FEES TAIL COULD EXIST IN HAWAII.

Coming now to the merits of the case, we propose to show in this part (II) of this brief that all matters bearing on the question—the use of the aptest technical

words, all applicable presumptions, the frame of the sentence and all parts of the will taken as a whole—point in the same direction and combine to make the strongest possible case for a fee tail as against a life estate and remainder; and to show in the next part (III) of this brief that the matters relied upon by opposing counsel to show that a life estate and remainder was intended not only do not show that, but on the contrary support the theory of a fee tail.

In considering these questions we invite reference to the full copies of the will and codicils set forth in the transcript (pp. 78-92) or, more conveniently, to the brief synopsis of the will and codicils set forth in the appendix at the end of this brief.

1. *The aptest technical words are used for the creation of a fee tail.*

The devise is to Kahakuakoi and Kealohapauole, her husband, "and to the heirs of the body of either."

It is elementary that the words "and heirs" and "and heirs of the body", following a gift to named grantees or devisees, are the ordinary, natural, technical words used to denote an estate of inheritance (in the one case a fee simple and in the other a fee tail), and that there is such a strong presumption that when these words are used they are used for that purpose, that to give them a different construction would be to hold that they are used in an abnormal sense; also that their function is not to indicate an intention to benefit or give an estate to "the heirs" or "heirs of the body", but merely to indicate the nature or character of the estate in respect of *quantum* of interest intended to be

given to the first takers. In short, they are words of inheritance or limitation and not of purchase.

In these respects the words "heirs of the body" are even stronger than the word "heirs" and less capable of having their technical meaning overcome by other context. (Hawkins, Wills, \*183-184.)

A few cases will be cited, first to illustrate the potency of these words in these respects in other jurisdictions and then to show that it is the same in Hawaii.

In *Hunter v. Watson*, 12 Cal. 363, a case of a fee simple, the conveyance was to K and his heirs, but as K happened to be dead, it was held that the deed was a nullity; for K himself could not take because he was dead, and the "heirs" could not take because, as the court said (p. 377), that word

"is not a word of purchase, carrying title to the heirs, but only qualifying the title to the grantee."

In *Burnett v. Burnett*, 17 S. C. 545, a case of a fee simple conditional, which instead of a fee tail is held to exist in South Carolina, the conveyance was to a daughter "and the lawful heirs of her body \* \* \* or to the trustees for her and her heirs' use and benefit." The court, referring to a contention that the provision for trustees and the use of the word "heirs" instead of "heirs of the body" in the second instance controlled the words "heirs of her body" in the first instance so as to make a life estate and remainder, said at page 549:

"These are the apt words to create an estate in fee conditional, and we are unable to discover



anything in the terms of this deed to take this case out of the well-settled rule",

and further, at page 551:

"The fundamental difference between an estate in fee conditional, after the condition has been performed, and an estate in fee simple, is, 1st, That in the former the course of descent is confined to a particular class of heirs, and upon failure of such heirs the estate reverts to the donor; 2nd, That the holder of such an estate can only dispose of it by some act which takes effect during his life. In all other respects their qualities and incidents are the same. In a grant of an estate in fee conditional, heirs of the body are not named on account of any benefit intended for them or for the purpose of controlling or limiting the ancestor's power of disposition during his life, but simply for the purpose of prescribing the course of descent, in case no such disposition is made. In the case of a fee simple estate the law prescribes that the estate shall descend to the heirs generally, in case the ancestor makes no disposition of the estate, while in the case of an estate in fee conditional the instrument creating the estate confines the descent to a particular class of heirs. Both classes of heirs take by succession from the ancestor."

In *Pearsol v. Maxwell*, 68 Fed. 513, a case of a fee tail, the devise was to E, *habendum* to E "and the heirs of her body", with gifts over in certain events, which it was contended controlled the words "heirs of her body", so as to create a life estate and remainder. The court, however, held otherwise, saying, at page 514:

"These are the aptest words for the creation of an estate tail. Standing alone they would admit

of no other interpretation. When, after the devise of the land to Edith, the testator subjoined the words, 'to have and to hold the same to the said Edith Pearsol and the heirs of her body', it is difficult to conceive how he could have had in view any other purpose than thereby to define the *quantum* of estate which she would take. \* \* \* The presumption, of course, is that the words were employed in their technical meaning. \* \* \* Now, 'heirs of the body' are strictly and technically words of limitation. 'Nothing can convert them into words of purchase but a clearly expressed intention of the testator to use them in an abnormal sense'. \* \* \* 'the intent not to use the words in their legal sense must be unequivocal, and so plain that no one can misunderstand it.' "

On appeal in the same case, 76 Fed. 428, the Court of Appeals said:

"That these words, if alone considered, created an estate tail, is hornbook law."

And, to the argument that in a will technical words yield to intention as disclosed by the entire will, the court replied, true, but,

"Even in a will the presumption is that technical words have been used in their technical sense and this presumption cannot be rebutted otherwise than by showing an unequivocally expressed intent to use them in some other sense."

In a will, of course, the use of the word "heirs", although advisable, is not always or strictly necessary to create a fee simple even at common law (2 Jarman, Wills, 5th ed., \*274), but when it is used in a will it has the same significance as if its use were

necessary. In Hawaii the same is true of deeds as well as wills. (*Branca v. Makuakane*, 13 Haw. 499, 506; *Kaleialii v. Sullivan*, 23 Haw. 38, 44.)

In *Thurston v. Allen*, 8 Haw. 392, the court, speaking of the use of the word "heirs" in Hawaiian Land Patents to denote a fee simple, said (p. 402):

"It was introduced to define the character of the estate in the patentee." (See also page 397.)

In *Robinson v. Aheong*, 13 Haw. 196, a fee simple case, the court, referring to the words "and to their heirs forever" in a will, said (p. 199):

"The word 'to' before 'their heirs' is not sufficient to show that the heirs were to take by way of remainder. Those words must be regarded as words of limitation and not of purchase, although the rule in *Shelley's Case* is not in force here."

In *Ninia v. Wilder*, 12 Haw. 104, a case of a qualified fee simple, in which the devise was to certain persons "and their heirs and representatives forever", with gifts over in certain contingencies, and in which it was contended that the devise created only life estates and remainders, the court said (p. 108):

"These are apt and proper words for the conveyance of the estate in fee and the intention to give the fee could not have been more adequately expressed if every word in the English language had been employed."

In *Rooke v. Queen's Hospital*, 12 Haw. 375, a case of a fee tail, where the devise was to Emma "to be used and enjoyed by her during the term of her natural life, and her children forever", with a gift.

over in the event of her death without leaving any issue, "children" was held to be the equivalent of "heirs of the body" from which it followed that Emma took an inheritance notwithstanding the reference to "the term of her natural life", the court saying (p. 380):

"Whether she would take an estate tail or not would depend upon whether 'children' as used here would be considered a word of purchase or a word of limitation. It would be a word of limitation if it were a *nomen collectivum*, meaning 'issue' in its broader sense of 'heirs of the body' or offspring of every degree, denoting what estate Emma was to have and that the children were to take, if at all, through her by descent, and not directly under the will."

In *Nahaolehua v. Heen*, 20 Haw. 372, another case of a fee tail, the court said (p. 376):

" 'The technical language to create an estate tail is to limit the estate to a man and the heirs of his body,' \* \* \* The phrase, 'the heirs of his body' as used in the deed, are therefore, the appropriate words to create an estate tail. They are words of inheritance, as well as apt words of procreation, which are essential to the creation of an estate tail."

Finally, in the present case (*Kinney v. Oahu Sugar Company*, 23 Haw. 747, 752-753; Tr., pp. 46-48), the Supreme Court of Hawaii sets forth these principles in a commendably clear, accurate and complete manner, with references to text books and to Hawaiian and other cases.

Somewhat similarly as to the use of the word "successors" in *Bishop of Zeugma v. Paahao*, 16 Haw.



345, in which a deed was made to a bishop and his "successors in office" and in which it was contended by counsel that the Bishop was an ecclesiastical corporation sole so that upon his death his successor would take, but held by the court that the Bishop was not a corporation and that his successor therefore could not take by succession and also that since the word "successors" in the deed was a word of limitation he could not take by purchase, saying (p. 348) :

"The word 'successors' as here used, is a word of limitation and not of purchase. The present bishop could not take under that deed by way of remainder."

2. *All applicable presumptions favor a fee tail as against a life estate and remainder.*

The presumption that "heirs of the body" are used as words of inheritance and the strength of that presumption have just been shown, especially in the *Pearsol* case. But there are other presumptions that operate to the same end. One of them is mentioned also in the *Pearsol* case (68 Fed. 513, 515) :

"The rule is to regard the first taker as the preferred object of the testator's bounty, and in doubtful cases the gift is to be construed so as to make it as effectual to him or her as possible."

Perhaps we cannot do better than to sum up most of these presumptions, which are of a familiar nature, in the language of the court in *Smith's Appeal*, 23 Pa. St. 9, 10-11, in which it was held that what would be a fee tail in personal property, if such an estate could exist in that kind of property, was an absolute estate

and not a life estate and remainder, since estates tail cannot exist in personal property.

“To construe it a life estate in the first takers would be to prefer the second takers, who are unknown, to the first, who are known, contrary to the rule which prefers the primary to the secondary objects of the testator’s bounty. \* \* \* In cases of doubtful construction the law leans in favor of an absolute, rather than a defeasible estate; of a vested rather than a contingent one; of the primary, rather than the secondary intent; of the first rather than the second taker, as the principal object of the testator’s bounty; and of a distribution as nearly conformed to the general rules of inheritance as possible.”

Such presumptions are recognized in Hawaii as well as elsewhere. See *Hemen v. Kamakaia*, 10 Haw. 547, 557, and the present case (23 Haw. 747, 760; Tr., p. 57).

In the lower court opposing counsel advanced one presumption as favoring the plaintiff’s case, namely, that a testator will be presumed to have intended a legal estate rather than an illegal one. His brief, pp. 30-43, 69-70. This contention was well met by the decision of the Supreme Court (23 Haw. 747, 756; Tr., pp. 51-52.) The court held that such a presumption could not control when, as in the present case, the language of the will showed unmistakably that the intention was to create a fee tail; also that the presumption would have little force when, as in this instance, the will was made sixteen years before it was decided that estates tail could not exist in Hawaii and when there was an impression that such estates could

exist there. As to this, see pages 16-19 above. We may add that such a presumption does not favor one legal estate as against another legal estate. If it would operate at all, it would operate as much in favor of a fee simple as in favor of a life estate and remainder. The cases cited by the plaintiff on this general subject obviously are not applicable to the facts of this case. The Supreme Court of Hawaii and the courts in the several states have not hesitated to hold that an estate tail was intended when the language called for such construction, notwithstanding that such estates could not be created. (See Subdiv. 1 of Part II above and Subdv. 3 of Part IV below.)

3. *The Present nature of the devise and the absence of words of separation or futurity strongly indicate an estate of inheritance.*

The devise is "unto them and to the heirs of the body of either." This is a single unbroken clause in the present tense and without the slightest indication either that the first takers were to take only for life or that the heirs of their bodies were to take "after the decease" of the first takers or in "remainder."

The heirs of the body could not take immediately (concurrently), for they were not in existence as heirs, that is, they were not yet ascertained, and they could not take in remainder because the gift was immediate. Hence, the only way they could take would be by inheritance through the parents—by holding that the latter took an estate of inheritance.

The same would be true even if the gift were ex-

pressed to be to the parents for life. For, while the absence of the words "for life" or their equivalent are significant as negating an intention to give only a life estate, their presence is not very significant as showing an intention to give only a life estate, except in connection with other indications, for they would have the estate for life anyway, whether only for life or in fee. But the absence of such words of separation or futurity as "after their decease" or "remainder" are especially significant, and the more so since the testatrix used both of those expressions so many times in other items of the will and codicils to indicate her intention to give a life estate and remainder, as will be pointed out more fully in the next subdivision of this brief. In this instance, there is an absence of both classes of expressions, namely, "for life" and "after their decease" or "remainder."

These features were considered somewhat fully in *Rooke v. Queen's Hospital*, 12 Haw. 375, in which the devise was (1) to the testator's wife "to be used and enjoyed by her during the term of her natural life, and from and immediately after her decease" (2) to his daughter "to be used and enjoyed by her during the term of her natural life, and her children forever," with a gift over in certain events. It was held that the daughter would take an estate tail at common law, notwithstanding that the devise was "to be used and enjoyed by her during the term of her natural life," notwithstanding that the wording of the limitation was "children" instead of "heirs of the body" and notwithstanding that the two classes of



beneficiaries were separated by a comma. Among other things the court said:

At page 381, referring to *Wild's Case*, 6 Rep. 17:

"It was further resolved that in the case of a devise simply to A and to his children or issue, without the words 'after his decease' or their equivalent, if he had children at the time of the devise, he and they would take jointly for life, that being the manifest intent and there being nothing to prevent its taking effect, but that if he did not have children at the time of the devise, he would take an estate tail, since there was a manifest intent that the children or issue should take, and as immediate devisees they could not take, because they were not in *rerum natura*, and by way of remainder they could not take, for that was not the intent, because the gift was immediate, and therefore A would take an estate tail and 'children' would be a word of limitation."

At page 385:

"And as we have seen by the decision and the first resolution in *Wild's Case* the presence of the words 'after their decease' was deemed sufficient to negative the idea of an estate tail, whether there were children at the time of the devise or not, but by the rule in that case, where such words were absent, although the word 'to' was present, the existence or non-existence of children at the time of the devise determined whether the children should take with their parents jointly or the parents take an estate tail. That the children would take a remainder was considered out of the question.

"The absence of such words as 'after her decease' following the devise to Emma and preceding that to her children is the more significant here from the fact that the testator had already

used similar words to separate the devise to Emma from that to his wife, namely, the words 'and from and immediately after her decease'."

At page 385 again:

"As the devise to the children stands, it is immediate, to take effect upon the death of the testator, but since there were no children at the time of the devise, it could not have been intended as a direct devise, for if it was, the children if born after the death of the testator could not take at all—which clearly was not the intention. Such words as 'after her decease' are natural and usual where a remainder is intended and great weight is always placed upon their presence to show that the words following were intended as words of purchase, and likewise great weight is properly placed upon their absence as tending to show that the following words were intended as words of limitation."

At page 387:

"The form of the sentence favors the argument that the words in question were not intended to limit Emma's estate to her life and give her children a direct fee simple, for, as already pointed out, there is no break indicated by such words as 'after her death' or 'in remainder to' or by the repetition of the words 'I give and devise' or even the word 'to.' The devise is to Emma \* \* \* to be used and enjoyed by her during the term of her natural life, and her children forever,' as if the testator were merely expressing what estate was given to Emma or how it should be enjoyed, namely, by her during her life, and by her children forever, in other words, as if he intended this as merely a *tenendum* clause."

- At page 387, also, the court refers to a leading case on this subject as follows:

“In *Kendall v. Clapp*, 163 Mass. 69, the devise was to the testator’s wife, ‘for her sole use and comfort during her natural life, and to her heirs and assigns forever’. After remarking that the words ‘heirs and assigns’ are the usual technical words to signify a fee, the court said, ‘the absence before the words ‘to her heirs and assigns forever’ of technical phrases, such as ‘after his death,’ or ‘in remainder’, commonly employed to denote a devise or gift in remainder, and also the fact that the whole limitation is in an unbroken sentence, lead to the same result.”

See also the reference on pages 388-9 to a decision by Judge Story.

See also *Oxford v. Clifton*, 1 Eden 473 (28 Eng. Reprint 768).

The distinction between a devise containing such words of separation or futurity and one which does not, is pointed out by Jarman even in cases in which the more flexible term “issue” is used instead of “heirs of the body.”

2 Jarman, Wills, 5th Ed., 414.

In the present case, the Supreme Court of Hawaii recognized the significance of the absence of words of separation or futurity. (23 Haw. 747, 754; Tr., p. 50.)

Opposing counsel contends (his brief, pp. 26-27, 48) that “and to” are words of demarcation or separation. Nothing, however, is commoner than the insertion of “to” in devises and deeds “to A and to his heirs” or “to A and to the heirs of his body.” These expres-

sions are always regarded as the equivalent of similar expressions without the insertion of "to." For examples, see *Kendall v. Clapp*, just referred to as followed in the *Rooke* case, and *Robinson v. Aheong*, quoted from on page 33 above, and *Huntley's* case at page 71 below.

To separate an unbroken devise, such as to A and the heirs of his body, into a life estate and remainder would be on a par with uniting, by the rule in *Shelley's Case*, a separated devise, such as to A for life and after his death to the heirs of his body, into a fee tail. It would amount to an adoption of a sort of reverse of the rule in *Shelley's Case*, thereby equally subverting the intention. The rule in *Shelley's Case*, because it usually thwarted the intention, was held not to obtain in Hawaii. (*Thurston v. Allen*, 8 Haw. 392, since followed in a number of cases.)

4. *An intention to give an estate of inheritance is clearly shown by the will and codicils taken as a whole.*

The testatrix could not, if she had tried to, have framed either the two items directly in question or the will and codicils as a whole so as to show more clearly both that she intended the devise to be solely to Kahakuakoi and Kealohapauole and that she intended it to be an estate of inheritance. (It had not then been decided that a fee tail could not exist here.) Indeed, as the Supreme Court of Hawaii recognized in this case (23 Haw. 747, 756; Tr., p. 52), it was



supposed at that time that such an estate could exist here. (See pages 16-19, 36 above.)

She began her bounties to these people (see synopsis in the appendix of this brief) by giving (Will, Item 5) an annuity to "Kahakuakoi (w) and Kealohapauole, her husband", and to them alone and by name, jointly for life—with marked explicitness. She then added, "*And I also devise unto them* and to the heirs of the body of either", showing that she was making an additional gift solely to the same people—this time, however, an estate of inheritance instead of for life. Then (1st Codicil, Item 2) she revoked so much of the 5th Item of the will "as devises the land" therein named "to Kahakuakoi (w) and Kealohapauole," showing that she understood that she had made the devise to them and to them alone. "And in lieu thereof," she proceeded, that is, in lieu of the earlier devise to Kahakuakoi and Kealohapauole, she gave "unto said Kahakuakoi (w) and Kealohapauole (k)" alone another piece of land; "to have and to hold," that is, these same people and these alone were to have and to hold—a regular *habendum* clause applicable solely to the named devisees; and these were to have and to hold "as limited" in the fifth item of the will, showing that she regarded the words "heirs of the body of either" in that item as purely words of limitation, defining the quantum of interest given to the named devisees. Opposing counsel endeavors to obtain support from the words "as limited." The most that he reasonably could contend is that these words do not affect the

nature of the devise either way. We submit, however, that the established meaning of "limited" is such as to emphasize the idea of words of limitation. (See decision of the Supreme Court, 23 Haw. 747; Tr., p. 50.)

In line with the foregoing, we quote again from the *Pearsol Case* (68 Fed. 513, at 515):

"Still further, the language of the testator—'the part of my farm above devised to Edith Pearsol contains one hundred and seventy-five acres'—is very significant. It clearly evinces that in the mind of the testator Edith was his sole devisee of this land."

The other provisions of the will and codicils show that the testatrix knew precisely how to make gifts of various kinds by the use of apt language, and particularly that she knew how to create life estates and remainders. As the trial court (the Circuit Court) said (Tr., pp. 33, 34):

"If there is one thing above all others that is shown by this will and codicils it is that the testatrix knew how, when she so desired, to grant a life estate. There are no less than fifteen estates for life created by this will. \* \* \* It is equally plain that the testatrix knew how to devise land by proper words to reach the result claimed by the plaintiff herein to have been her intention in the case at bar. \* \* \* I am irresistibly led to the conclusion that the testatrix meant to give to Kahakuakoi and Kealohapauole something more than a life estate. She meant to give them an estate of inheritance. I am of the opinion that she intended to create an estate in fee tail."

See also, more fully, the decision of the Supreme Court, 23 Haw. 747, 751; Tr., p. 46.

In several instances annuities were given for life, the testatrix in each instance stating that the annuity was "during her life" when it was to one, or so much "each \* \* \* during the term of the natural life of each of them" when it was to two severally, or to them and "the survivor of them \* \* \* so long as either of them may live," when it was in form to two for their joint lives with the right of survivorship, etc., according to the circumstances. (Will, Items 5, 6; 1st Codicil, Item 10.)

In numerous instances life estates and remainders were given in lands. The part of the devise which was for life was in every case expressed to be to a named person "to have and to hold for and during the term of his (or her) natural life," except in one instance, when it was "to hold for his life." (Will, Items 4, 7, 8, 9, 10, 15; 1st Codicil, Items 2, 3, 4, 5, 6, 13; 2nd Codicil, Items 1, 2, 3.) The part of the devise which was in remainder was expressed to be either (a) "and after his (or her) decease to my trustees" or "and upon his (or her) decease to my trustees" or "upon his (or her) decease to my trustees" (Will, Items 4, 7, 8, 9, 10, 15; 1st Codicil, Item 2), or else (b) "remainder to my trustees." (1st Codicil, Items 3, 4, 5, 6, 13; 2nd Codicil, Items 1, 2, 3.) In three instances, the testatrix showed that she knew how to use apt language to produce just such a result as the plaintiff asks the court to hold was produced by the devise in question, that is, how

to give an estate jointly or by entirety to husband and wife with right of survivorship for life with a remainder over. In each instance the devise was to two named persons "to have and to hold for and during the term of their natural lives and that of the survivor of them; remainder to my trustees." (1st Codicil, Items 4, 5, 6.)

So, on the other hand, as to absolute estates, whether of personal estate "to have and to hold to him, his executors, administrators and assigns forever" (Will, Item 16) or of real estate "to have and to hold with the appurtenances to him, his heirs and assigns forever" (1st Codicil, Item 9), or of real and personal estate to trustees "their heirs and assigns forever" upon certain trusts. (Will, Item 13.)

So, in the devise in question, she could have had no other intention than to devise a fee tail.

To quote still again from the *Pearsol Case* (68 Fed. 513, at 514):

"It is to be noted that there are no words whatever in this will to restrict Edith's estate to her lifetime. Had that really been the intention of the testator, he surely would have so expressed himself. He knew very well how to do this; for, making provision in favor of Sarah Wellington, he provided that 'she is to have a life estate in the first room of my mansion.'"

See, also, *Snyder v. Baker*, 5 Mackey (D. C.), 443, 456.

It will be noticed, also, that in every instance of an express remainder, the remainder is given to the trustees. It is very unlikely that the testatrix would have



selected the indefinite "heirs of the body" of the named beneficiaries in the particular devise in question, without any apparent reason, to be remaindermen, and especially as she named the trustees as the remaindermen or devisees over in the same item; nor is it likely that she could have intended to make the "heirs of the body" remaindermen in any such obscure way by implication as is contended for by the plaintiff when in all other instances she created remainders by the clearest possible language. (See decision of the Supreme Court, 23 Haw. 747, 756; Tr., p. 51.)

Again, in Item 16 of the First Codicil the testatrix empowers,

"all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent, however, after such decease to be paid to my executors or trustees."

Hence, if the Court should hold that Kahakuakoi and Kealohāpauole took only a life estate, whether at common law or as a substitute for an intended estate tail, they or the survivor of them just before death might have made a ten-year lease which would have continued valid after death, but the rent under which would after death go to the trustees and not to the "heirs of the body". That would be the inevitable result if the plaintiff's claim that they took

only a life estate should be sustained. Could anything be more absurd? The testatrix could not have had the remotest suspicion that anyone might ever be found so bold as to contend that she had given Kahakuakoi and Kealohapauole only a life estate with remainder to the heirs of their bodies but with power on their part to make a lease that would continue in force after their deaths, *but the rents from which would until the termination of the lease go to the trustees and not to the remaindermen*. See decision of the Supreme Court, 23 Haw. 747, 756; Tr., p. 51. Plaintiff's counsel concedes (see page 88 of his brief) that, at least at first sight, this would militate against his theory of a life estate and remainder. He then endeavors to meet it by assuming the very thing he has to prove (that the first takers took only a life estate anyway) and, worse still, by assuming that the Court itself so held, and then dogmatically saying that the heirs of the body instead of the trustees would take the rents after the death of the first takers notwithstanding this provision!

### III.

THE MATTERS RELIED ON BY THE PLAINTIFF IN SUPPORT OF HER THEORY OF A LIFE ESTATE AND REMAINDER NOT ONLY DO NOT SUPPORT THAT THEORY BUT ADD MATERIAL SUPPORT TO DEFENDANT'S THEORY OF AN ESTATE TAIL.

So conclusive are the reasons already given to show that the estate would be a fee tail, if a fee tail could

exist in Hawaii, that in order to overcome them the plaintiff would have to find some arbitrary, unyielding rule of law that would apply irrespective of the intention, or else find something else in the will that would show a contrary intention in the most unmistakable manner. In her quest for the latter, she seizes on the word "either" and the devise over "upon default of issue" in the fifth item of the will and, more feebly, on the words "and to" in the same item and the words "as limited" in the eleventh item of the first codicil. But these, we submit, clearly avail her nothing but on the contrary militate against her. The words "and to" and "as limited" have already been considered (pages 41 and 43-44 above.) "Either" and the devise over "upon default of issue" will now be considered.

1. *The word "either" not only does not militate against but substantially supports the theory of an estate tail.*

(a) Plaintiff's counsel in casting about for authorities to support his novel theory that somehow or other the word "either" has the effect of splitting the estate in two so as to make a life estate in the first takers and a remainder in fee simple in the heirs of their bodies, fastened upon a group of cases that have to do with "superadded words of limitation" as discussed in 2 Jarman, Wills, 359-363.

A superadded limitation is of course a second limitation added to the first limitation, as, to A for life and after his death to the heirs of his body and the heirs male of their bodies. It tends to show, when it is

different from and narrower than the first limitation, as in the example just given, that the class mentioned in the first limitation was intended to be a new stock or starting point, especially if there are words of futurity or separation between the first takers and the first limitation, as in the same example. The super-added or second limitation is supposed to show how the descent is to go from the class mentioned in the first limitation—not how it is to go from the first takers—and thus make a change in the course of descent, the course from the second to the third takers being different from that from the first to the second.

Accordingly, in the Circuit Court, plaintiff's counsel, in order to make this case fit the group of authorities found by him, contended that "either" is a super-added word of limitation. He even convinced that Court that it is. But that Court nevertheless held that the rule as to superadded words of limitation is not a hard and fast one, but only a rule of construction, and that the case was so clear for an estate tail that it could not be overcome by even a superadded limitation, *Tr.*, pp. 35-36.

Of course, the circuit judge was in error in holding that "either" is a superadded limitation, and hence our case is all the stronger for an estate tail, for there remains nothing whatever looking in the direction of a life estate and remainder. The function of "either" is not to indicate how the descent is to go from those mentioned in the first and only limitation. It has to do with descent to, not from, the heirs of the bodies of the first takers. Its function is solely to indi-



cate the course of descent from the first takers, that is, whether the "heirs of the body" mentioned in the only limitation there is, are to be the heirs of the body of one or of the other of the first takers or of the survivor of them or of their joint bodies or of either or each whether by the other or a later spouse. It has to do with the source from which the only mentioned heirs of the body spring. Accordingly in his brief in the Supreme Court, plaintiff's counsel abandoned his theory of a superadded limitation, but endeavored to obtain the benefit of its underlying principle and of the same group of authorities, and so he claimed that "either" would at least cause "a change in the course of descent". But upon our showing in our brief that "either" no more would cause a change in the course of descent than it would be a superadded word of limitation, he, in his argument in the Supreme Court as in his brief in this Court, practically abandoned also his theory of a change in the course of descent and advanced a third theory of "explanatory and qualifying" words. He, however, is still obliged to rely on the same group of authorities, such as *Daniel v. Whartenby*, 17 Wall. 639; *Green v. Green*, 23 Wall. 486; *De Vaughan v. Hutchinson*, 165 U. S. 566, and *Luddington v. Kime*, 1 Ld. Raym. 203. (His brief, pages 59-60.) Thus, he is in the awkward position of being under the necessity of supporting his theory without having the usual necessary basis of "superadded words of limitation", and at the same time of being obliged to rely upon authorities which depend upon such superadded

limitations. It is like trying to make bricks without straw. Not only are there superadded limitations in the authorities upon which he relies, but usually there are words of futurity and separation and usually the real question has been whether the rule in *Shelley's Case* applied or not, that is, whether there were "explanatory or qualifying" expressions enough to take the case out of that rule, and in most of the cases there have been other special features. Jarman, moreover, says, *ubi supra*, that even where there are superadded words of limitation, they do not have the effect contended if they are either the equivalent of or broader than, as distinguished from narrower than, the words of the first limitation; and yet the only effect that the plaintiff claims for "either" is that it broadens the scope of "heirs of the body". No wonder the Supreme Court found against him on this point. (Tr., pp. 48-49.)

(b) Why strain to give "either" some occult or ulterior or conjectured meaning or effect for the purpose of overcoming the otherwise plainly expressed intention of the testatrix? Why not construe "either" naturally? We entirely agree with opposing counsel that "either" has the effect of enlarging the "heirs of the body" from those of the body of each by the other alone to those of the body of each by any spouse. This fully accounts for its use. It is all the explanation that is required. Any other explanation would be conjectural and even fanciful and arbitrary. The effect is, therefore, to make the estate an estate tail general instead of an estate tail special, as, it is agreed,

it would otherwise be. This is the view taken by the Supreme Court. (Tr., p. 49.)

If "either" has any other effect, it is, as shown in the opening statement of this brief, to separate the estates longitudinally as between the two first takers so as to make them take in common, instead of jointly or by the entirety, either part or all of the time.

Plaintiff's counsel, however, would go further and make out that in some way or other "either" has the effect of separating the estates transversely as between the first takers and the heirs of their bodies, and of not only giving the latter remainders by purchase but of creating cross-remainders between them. That certainly is imposing a considerable burden on that innocent word.

He strives to make out that the fact that the first takers take by the entirety makes a difference—reasoning that since that is so (that is, if the entirety is for the inheritance as well as for life), the heirs of the body of the survivor alone would inherit, but that the testatrix intended that the heirs of the body of each should take in any event, and hence that there is a change in the course of descent. But it is a contradiction of terms to assume, on the entirety theory, that the descent would be to the heirs of the body of the survivor alone, and that, on the intention theory, it would be to the heirs of the body of each, and then to assert that there is a change in the course of descent, for these two courses of descent could not both exist, either concurrently or successively. The course is either to the heirs of the body of one or to those of

each directly from the first takers, and that is all there is to it. What the course is from the first takers depends on how the first takers take—whether jointly or by the entirety or severally or part of the time jointly or by the entirety and the rest of the time severally.

Plaintiff's counsel has the cart before the horse. He also ascribes a causal relation between independent things. He first assumes that the estate is by the entirety and then tries to argue from that to ascertain whether it is for life or in fee, as if the former had anything to do with the latter. The usual course is to determine independently whether it is for life or in fee and then, whichever it is, the law makes it joint or entire or several according to whether the takers are husband and wife or not and whether there are words of severalty or not and whether the presumption favors a joint or entire tenancy, as at common law, or a several tenancy, as in many jurisdictions under statute or judicial decisions.

Plaintiff's argument goes too far and refutes itself by leading to absurdities. He argues that, because, the limitation is to the heirs of the body of either, the course of descent cannot be to the heirs of the body of the survivor alone. He assumes that the heirs of the body of each were intended to take in any event upon the death of the first takers, so that, for instance, if the only heirs of the body were those of only the first-dying first taker they would take the whole. This, of course, is a pure unfounded assumption. There is nothing in the will to support it. It is, moreover, an



assumption of the very thing to be proved, namely, that the heirs of the body are to take by purchase and in remainder. It overlooks the fact that "heirs of the body" are mere words of limitation indicating the *quantum* of the estate of the first takers.

If the argument is sound, then (and this is the absurdity to which it leads) whenever the limitation of "heirs" or "heirs of the body" relates to each of two or more first takers, the estate cannot be a fee (whether simple or tail), but must be a life estate and remainder. This may be illustrated in several ways. Let it be borne in mind that if the devisees are husband and wife, the heirs of the body are held to be the heirs of the joint bodies unless there is something additional to show that they are intended to be the heirs of the several bodies, and that the word "either" shows this in the present case, so that it makes this case like any other case where the heirs or heirs of the body are not necessarily the heirs of the joint bodies.

Let us first illustrate by the ordinary case of a devise to "A and B and their heirs" (general). Here "heirs" means the heirs of each. They are the heirs general (collateral as well as lineally descendant and ascendant) and those of A may be in whole or in part different from those of B, just as in the present case the "heirs of the body" of one first taker may be different in whole or in part from those of the other. The estate, however, would at common law, in the absence of controlling context, be joint if A and B were not husband and wife, and by the entirety if they were

husband and wife; and in jurisdictions in which the presumption is changed, the estate would, in the absence of controlling context, be several (in common). In any case it would be a fee simple in the first takers. And yet, if the plaintiff's argument were applied, it would have to be held that, since the "heirs" are those of each A and B, it was intended that they all should take in any event, as, for instance, if there were only heirs of the one dying first, they should take the whole; that therefore there must be contingent cross remainders between all the heirs, and hence that they must take by purchase, and therefore the first takers must have only a life estate!

Somewhat similarly, take the case of a devise to "A and B and the heirs of their bodies", when A and B are not and cannot become husband and wife. In such case, as held everywhere, "heirs of their bodies" means heirs of the bodies of each, just as in the present case, where the first takers are husband and wife, the word "either" makes the "heirs of the body" the heirs of the body of each, when but for "either" they would be heirs of the joint bodies. In such case, as will be shown below, since the severance affects only the inheritance, A and B would at common law hold jointly for life with several inheritances, that is, they would hold the fee tail in common subject to holding it jointly during life, and if the word "respectively" were added so as to affect the whole estate A and B would hold the whole fee severally. In any event the first takers would have the fee tail, whether they would hold it severally all the time or jointly part of the

time and severally the rest of the time. And yet, on plaintiff's argument, since the "heirs of the body" are those of each, there would have to be a life estate in the first takers and cross remainders in the heirs of the bodies!

(c) What, after all, does "either" mean? It might be contended that it had any one of the following four meanings:

First, it might be contended that "either" was used in its ordinary natural sense, so that "the heirs of the body of either" would mean "the heirs of the body of one or the heirs of the body of the other". But such a devise would be void for uncertainty, just as a devise to A or B would be void for the same reason. That would be different from a devise to A or his heirs, for both A and his heirs could not be in existence at the same time. (3 Wash., R. P., 6th ed., secs. 2115, 2118.) Hence, the remainder, if a remainder were intended, would, under this construction of "either", be void for uncertainty, and the only hope for the heirs of the body of either would be to hold that the first takers took an estate of inheritance.

Secondly, it might be contended that, strictly speaking, "either" excludes "both" as was held in *Martin v. Nahoa*, 4 Haw. 427, 429. If so, still more would the heirs of the "body of either" exclude heirs of the "bodies of both". Hence, since there were no heirs except of the bodies of both (joint), the remainder, if a remainder were intended, lapsed. The only hope, therefore, for the "heirs of the body of either", under this construction also would be to hold that the first

takers took an inheritance, for in such case such heirs would have a chance to get something by descent, or the first takers would be in a position to make provision for them.

Thirdly, it might be contended that "either" was used in the sense of whichever of the first takers survived; that is, as meaning the survivor. The plaintiff, indeed, has suggested that it was used in the same sense as in the bequest in the preceding part of the same paragraph, so as to make the devise as if it were to the first takers and the survivor of them and the heirs of the body of the survivor of them. This would make the survivor (not the heirs) take the inheritance, and, of course, is not what the plaintiff wants. There are also insuperable objections to it. That meaning is not natural. Also, the testator did not say survivor, although she knew well how to say it when she meant it, as shown in the preceding part of the same paragraph and elsewhere. Moreover, "either" in the preceding part of the paragraph, while it might result in the survivor, does not mean the survivor, but means one or the other, and is used to indicate length of time, while here it is used to indicate what persons are to take. Apparently, also, as the plaintiff herself contends, the testatrix did not intend to limit the descent to the heirs of the survivor as against the heirs of the one dying first, but intended merely to make no distinction between them and leave the law to take its course as to how the descent should go.

Fourthly, it might be contended that "either" means whether of one or the other, so that the devise would



in effect be to the first takers and the heirs of the body of each by whomsoever begotten. This, we think, is the sense in which the word was used. It means simply that there is no restriction on the heirs of the bodies. They are not limited to those of each by the other. The estate is a fee tail general and not special. It is in principle much like, but clearer than, a devise to A and B and the heirs *on* the body of A by B begotten, in which both A and B take a fee tail because "the heirs of the body" do not look or apply to one more than to the other. (See Elphinstone, Interpretation of Deeds, 235; *Denn v. Gillot*, 2 T. R. 431 [100 Eng. Reprint 232].)

Thus the word "either" not only does not help the plaintiff's case but it adds strength to the defendant's case. It is additional evidence that the first takers were to take an estate of inheritance. Indeed, it would be difficult, if not impossible, to give effect to a devise directly to the heirs of the body of either of two persons just as it would be impossible to give effect to a devise to either of two named persons. But when "heirs of the body of either" are construed as words of limitation and not of purchase, all difficulty disappears. The devise is to K and K, and the remaining words are used merely to indicate what estate they were to take. No such nicety or definiteness of expression is required in order to show that, as is required in a direct devise to the heirs of the body of either. And it is inconceivable that the testatrix would have used this means of showing that the heirs of the body were intended to take as remaindermen and

especially in view of the nicety of language used by her in the rest of the will and codicils and particularly when she created the remainders.

(d) Again, the important questions are, (1) who were to take, (2) what were they to take and (3) how were they to take?

(1) K and K were to take. (2) The word "heirs" shows that what they were to take was to be a fee of some kind. The words "of the body" show that the fee was to be of the fee tail class. The word "either" shows that the fee tail was to be of the fee tail general class. (3) If they were not husband and wife, they would at common law take in joint tenancy in the absence of anything to show that they were to take in severalty. If they were husband and wife, they would take in entirety, in the absence of anything to show that they were to take in joint tenancy or in severalty. If there was sufficient to show that they were to take in severalty, they would take in common, whether they were husband and wife or not.\*

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\*In Hawaii, although (contrary to the common law) a conveyance to two or more created, in the absence of controlling context, a tenancy in common as against a joint tenancy (*Awa v. Horner*, 543), it did not have this effect as against a tenancy by the entirety. (*Robinson v. Aheong*, 13 Haw. 196, and cases there cited.) In general, also, statutes which reverse the common law presumption as between joint tenancy and tenancy in common, are held not to affect tenancy by the entirety unless the latter are expressly mentioned, as is now the case in Hawaii. Rev. Laws, 1915, Sec. 3132. But that statute would not affect the devise in question because it was enacted (1903) long after the devise was made (1884), and besides it is

Almost any combination might be made by appropriate language. In any case, the particular arrangement and relationship of the words must be noted.

For instance, as to who would take the fee. It would be *those whose heirs are specified*. If the devise is to A and B and the heirs of their bodies, of course, A and B take the fee tail. If to A and B and the heirs of the body of A, A takes the fee tail and B only a life estate, or, what is the same, A and B take jointly for life and A takes the fee tail, or A takes a fee tail subject to holding jointly with B for life. (Co. Litt., sec. 285.) If to A and B and the heirs of the body of A by B, A takes the fee tail and B only a life estate. But if to A and B and the heirs *on* the body of A by B, A and B take the fee tail, for the heirs of the body do not look more to one than to the other. (Authorities cited above.) Similarly, if, as in the present case, to A and B and the heirs of the body of either, A and B take the fee tail, for the heirs of the body do not apply to one more than to the other. If to A

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expressly made non-retroactive. In general, also, married women's acts are held not to affect the creation, or the presumption in favor, of estates by the entirety, and in Hawaii the married women's act (1888) was not passed until after the devise in question was made (1884).

Joint tenancies and tenancies by the entirety are so similar that it is immaterial in this case whether the first takers would take by one or the other. Indeed, in the older cases tenancies by the entirety are often spoken of as joint tenancies and distinguished only by reference to their distinctive features, such as that entireties are not subject to partition and cannot be severed by the act of one of the parties alone, and that

and B and the survivor and the heirs of his (the survivor's) body, the survivor takes the fee tail, and A and B take only for life. (*Phelps v. Simmons*, 159 Mass. 415, 417; *Ewing's Heirs v. Savary*, 6 Ky. 235, 237; *Harmon v. Christopher*, 34 N. J. Eq. 452, 462; *Vicks v. Edwards*, 3 P. Wms. 373.) If to A and B and the survivor and the heirs of their (A's and B's) bodies, A and B take the fee tail, and the intervening estate in the survivor does not alter that. (*Stones v. Heurtly*, 1 Ves. Sen. 165, 167 [27 Eng. Rep. 95, 96]; *Young v. Southern*, 2 B. & Ad. 628 [108 Eng. Rep. 1276].) If to A and the heirs of the bodies of A and B, no one, but A takes for life and the heirs of the bodies in remainder. (*Frogmorton v. Wharrey*, 2 W. Bl. 728; *Gossage v. Taylor*, Stiles 325; 2 Jarman, Wills, 1186.) Plaintiff cites these two cases but fails to see the distinction on which they are based.

So, as to precisely what they would take. If the devise is to A and B and the heirs of their bodies (not meaning of their joint bodies, as where A and B are

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on the death of one his or her interest does not go to the other strictly by survivorship, but remains in the survivor, in whom, as well as in the decedent, the whole had been all the time, since both hold *per tout*, while in joint tenancy they hold *per my et per tout* and in tenancy in common they hold *per my*. Although plaintiff's counsel (brief, pp. 45-47) tries to base a distinction upon these differences between a joint tenancy and a tenancy by the entirety to serve his purposes, he is unable to do more than to enumerate the differences and then boldly assert that they make a difference in the result in this case, without showing how or why or citing any authority. And, of course, there is no reason. Persons may hold by the entirety as well as jointly all of the time (in fee simple or fee



two men or two women or a man and woman who can not marry because within the prohibited degrees, etc.) they take a fee tail general. If to A and B (husband and wife) and the heirs of their bodies, they take a fee tail special, for this means heirs of their joint bodies. If to A and B and the heirs male or female of their bodies, or the heirs of the body of each by the other, etc., they likewise take a fee tail special. If, as in the present case, to A and B and the heirs of the body of either, they take a fee tail general.

For numerous illustrations, see Elphinstone, Interpretation of Deeds, 235; 1 Shep. Touch., 112.

So, as to how they would take. (See, also, the opening statement of this brief.) There are three possibilities.

First, if the only office of "either" is to show that heirs of the body were not intended to be confined to the joint bodies, and therefore to show that the estate was to be a fee tail general instead of special, as we think is the case, the first takers would take the whole

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tail) or part of the time (for life) and severally the rest of the time.

Of course, also, estates in fee tail as well as in fee simple or for life may be held by the entirety. (1 Shep. Touch, 112; 1 Preston, Estates, 2d ed., 131.)

Moreover, husband and wife may take in severalty or in joint tenancy as well as by the entirety. It is simply a matter of intention. That they may take in severalty, see *Hunt v. Blackburn*, 128 U. S. 464, 469; *Carroll v. Reidy*, 5 App. D. C. 59; *McDermott v. French*, 15 N. J. Eq. 78; *Statcup v. Statcup*, 137 N. C. 305; *Fulper v. Fulper*, 54 N. J. Eq. 431; *Wilkins v. Young*, 144 Ind. 1, 5; *Brown v. Brown*, 133 Ind. 476; *Hicks v. Cochran*, 4 Edw. Ch. 107, 110; *Minor v.*

fee tail by the entirety, in which case, of course, the descent would be to the heirs of the body of the survivor alone, as in the case of any fee simple or fee tail estate held by the entirety or in joint tenancy. That is elementary. See, however, for instance, 1 Preston, *Estates*, 2d ed., 131-133. The heirs of the body would not have a remainder.

Secondly, if "either" had the further effect of the full force of a word of severalty, like "respectively", the result would depend on whether it affected the whole estate or only the inheritance. If, for instance, the word had the effect of making the devise as if it were to the first takers "and the heirs of their *respective bodies*", the word "respective" would seem to affect only the inheritance, in which case it would leave joint or entire the part for the lives of the first takers and merely cause the rest, that is, their inheritances, to be held in common. In such case, also, the heirs of the bodies would not take in remainder or by purchase. The inheritance would be in the first

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*Brown*, 133 N. Y. 308, 312; *Baker v. Stewert*, 40 Kans. 442, 445; *Wilson v. Frost*, 186 Mo. 311; *McDuff v. Beauchamp*, 50 Miss. 531, 535; *Marchant v. Cragg*, 31 Beav. 398, 401 (54 Eng. Rep. 1193); 1 Preston, *Estates*, 2d ed., 132; 1 Tiffany, *Modern Law of R. P.*, sec. 165; Tiedemann, *R. P.*, sec. 244; 2 Jones, *Law of R. P. in Conveyancing*, sec. 1792; 1 Washburn, *R. P.*, 6th ed., sec. 914; 2 Cord, *Rights of Mar. Women*, sec. 1228; 4 Kent, *Com.*, 133. The only jurisdiction in which it is now held that husband and wife cannot take in common is Pennsylvania. *Stuckey v. Keefe's Extrs.*, 26 Pa. St. 397, relied on by plaintiff. (Brief, p. 46.) But that case was based in part on propositions of law that cannot be sustained, and for this it

takers, and the heirs of the body would take, if at all, by descent, but since the first takers hold jointly for life, the heirs of the body of the first-dying first taker as well as the heirs of the body of the surviving first taker would not take their moiety until the death of the surviving first taker. In other words, the first takers would have the fee tail general in severalty subject to holding jointly for life; and the inheritance of the heirs of the body of the first-dying first taker would be in abeyance until the death of the other first taker.

Thirdly, if, however, "either" had a broader effect as a word of severalty, so as to affect the entire estate, as, for instance, if it had the effect of making the devise as if it were to the first takers and "the heirs of their bodies respectively", the result would be that the first takers would take the whole estate in severalty, so that immediately upon the death of the first-dying first taker, the heirs of his (or her) body would inherit their moiety and on the death of the other the heirs of

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has been severely criticised (see Freeman, *Cot. & Part.*, sec. 72); it was based in part on the authority of *Dias v. Glover*, 1 Hoff. Ch. 71, decided by the Assistant Vice-Chancellor in 1839, and in ignorance of the fact that the contrary view had already been taken by the Vice-Chancellor in 1843 in the *Hicks* case, above cited, which latter view has ever since been followed in New York; it was based in part on the view that the question how husband and wife take is one of law and not of construction, although the latter is the correct view. (*Hiles v. Fisher*, 144 N. Y. 306, 312; *In re March*, 27 Ch. Div. 166.) And Pennsylvania stands alone as holding that husband and wife take by the entirety even when they take by descent. (*Gillan's*

her (or his) body would in turn inherit their moiety. In such case also the heirs of the body would not take by purchase or in remainder.

The law as set forth in the last two paragraphs is firmly established. It is well illustrated in *Ex parte Tanner*, 20 Beav. 374 (52 Eng. Rep. 647), per Sir John Romilly:

"I am of the opinion that these words create a joint tenancy for life, with several inheritances in tail. It is not disputed that 'if lands be given to two men, and to the heirs of their two bodies begotten, in this case the donees have a joint estate for the term of their two lives, and yet they have several inheritances in tail'. (Littleton's Tenures, sec. 283.) But it is contended that in the present case the word 'respective' creates a ten-

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*Extrs. v. Dixon*, 65 Pa. St. 395, based in part on the *Stuckey* case, *supra*. See *contra*, *Brown v. City of Baraboo*, 90 Wis. 151; *Knapp v. Windsor*, 6 Cush. 156.)

The idea that husband and wife cannot take in severalty originated with a passage in Littleton, which, however, as pointed out in *Marchant v. Cragg*, *supra*, referred only to joint tenancy. Even if they could not hold in joint tenancy, it would be immaterial in this case, for neither party claims that they did so hold. Both parties agree that they were to hold by the entirety at least for life. The only question is whether they hold also by the entirety or in severalty as to the inheritance (and it is immaterial for the purposes of this case in which of these ways they hold the inheritance), or do not hold the inheritance at all. But, while there have been statements to the effect that husband and wife cannot take as joint tenants although they may take as tenants in common, on the ground that tenancy by the entirety is only a species or slightly modified form of joint tenancy, such statements seem to be confined mostly to the older writers, for adjudications are wanting or rare, and, so far as the cases



ancy in common in tail, and that the expression applies not only to the inheritance, but to the whole estate of the children. I think, however, that the word 'respective' expresses only that which the law would imply without it. If lands were given to a man and woman, and the heirs of their bodies, this would be an estate in special tail (Littleton's Tenures, sec. 16), and the word 'respective', if introduced before the word 'heirs', would have the effect of making the man and woman joint tenants for life [that is, with several inheritances]. It would be the same as if the gift were to a man and woman who could not marry, and the heirs of their bodies. So if an estate were devised to two and their heirs, they would be joint tenants in fee simple, and if not severed the survivor would take the whole; but if the words 'respective heirs' were introduced, and it were a devise to A and B, and to their respective heirs, I should be of the opinion that they were joint tenants for life, with several

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are concerned, appear to amount merely to this, that the intention must be manifested more clearly to make out a case of joint tenancy than to make out a case of tenancy in common as distinguished from a tenancy by the entirety, because in general words which at common law would create a joint tenancy in others would create a tenancy by the entirety in husband and wife. (See the *Wilson* and *McDuff* cases, *supra*.) The weight of modern opinion is that husband and wife may take in joint tenancy as well as in common, if the intention appears with sufficient clearness. (*Hoag v. Hoag*, 213 Mass. 50, 53; *Tornburg v. Wiggins*, 135 Ind. 178, 185; *Fladung v. Rose*, 58 Md. 13, 21-5; Carr, Collateral Ownership, 14, 17, and other authorities *supra*.)

There is nothing in Hawaiian law to prevent husband and wife from taking either in common or in joint tenancy as well as by the entirety, as held by the Supreme Court of Hawaii in this case, 23 Haw. 747. (Tr., p. 49.)

inheritances in fee. I think I must give the same effect to these words as I should in the case suggested, and I must confine the application of the word 'respective' to the inheritance given after the estate to the children. If the devise had been to the children and the heirs of their bodies respectively, I should have held them *tenants in common in tail*. Here [in the case under discussion] the expression 'respective' is limited to the inheritance, and these are fit words to create a joint estate for life, with several estates of inheritance in tail. I think it would be impossible to give any other construction to these words, if the question arose upon a deed, and there is nothing from which I can come to a different conclusion when they are used in a will. 'The children were, therefore, joint tenants for the term of their lives, with several inheritances in tail.'

See also *Doe v. Green*, 4 M. & W. 229 (150 Eng. Rep. 1414); *Forrest v. Whitway*, 3 Exch. Rep. 366; Co. Litt., secs. 283, 284; (1 Thomas' Coke on Litt., 182b, 183a, 183b); 2 Preston, Estates, 2d ed., 425, 437; Bacon's Abridgement, Tit. Joint Tenants, G; Viner's Abridgement, Tit. Jointenants, L. 36 (492); 2 Jarman, Wills, 252; 2 Underhill, Wills, sec. 536. This was recognized by the Supreme Court of Hawaii in this case, 23 Haw. 747. (Tr., p. 49.)

All the sophistry of plaintiff's counsel (see his brief, pp. 22-25, 50-51) cannot alter this. His attempted sophistry, however, even if it were sound, would not help his case. In substance it amounts to selecting the methods of stating the result which he seems to think are the least unfavorable to him, the aim being obviously to camouflage the real result with the false

color of a life estate in the first takers and a remainder in the heirs of their bodies. For instance, referring to the result which we have stated under "Secondly" above, he says that the first takers would be "joint tenants for life, with several inheritances in tail", or that they would take "an estate for their joint lives and the life of the survivor, that is, as joint tenants with remainder to each of them as tenants in common in fee after the death of the surviving life". These are only two of a number of modes of expressing the same result. Another mode (see Preston, *ubi supra*) is to say that the first takers "will severally be tenants of their respective moieties in general tail, and they will be joint tenants of the freehold", that is, for life, or, as the Court said in *Doe v. Green, ubi supra*, "They took as tenants in common in fee, subject to an estate for their joint lives, and the life of the survivor."

The important thing is that, in whatever way the result is stated, the heirs of the body do not take by purchase or in remainder. The first takers take the fee, but have it for a time (during life) jointly and the rest of the time severally, and the heirs of the body take, if at all (that is, if the first takers do not dispose of it), only by descent. There is no possibility of making "either" do service in the way of breaking the estate crosswise at the death of the survivor so as to divide it into only a life estate in the first takers and a remainder (cross-remainders) in the heirs of their bodies.

Plaintiff's brief, indeed, teems with errors. On page 55, for instance, we read, "without the words

'of either' this devise would undoubtedly give an estate tail general to the survivor, which result curiously enough is attributed by the Court to the addition of the words 'of either' ". There are at least two errors in this statement: (1) The devise would not give any estate to the survivor. It would give an estate tail to both first takers, and the survivor would hold after the death of the other by operation of law; (2) Without the words "of either" the first takers would take an estate tail special and not an estate tail general. See, for example, *Ex parte Tanner, supra*.

(e) Apparently plaintiff's counsel has deemed it excusable to attempt to engraft on "either" some strange unnatural function because he has been unable to find any case in which that word occurs in just this way. The principles involved, however, are so well settled and so easy of application, not to mention the natural meaning of the words used, that it would be entirely immaterial whether any precisely similar case in all details could be found or not.

In *Huntley's* case, however, the word "either" is used just as it is here. That case is reported in three places and all three of the reports throw light on the question. (3 Dyer, 326a [73 Eng. Rep. 736]; Benloe, 226 [123 Eng. Rep. 159]; 1 Anderson, 21 [123 Eng. Rep. 332].)

Robert Huntley devised the land to his wife for life and then to Lucy Roper and Nicholas Griston, who were brother and sister, children of Matthew Griston, and to the heirs of either of their two bodies. The report in Benloe is partly in Latin and partly in



English. It says, in Latin, that the devise was in the English language and in these exact words:

“Item, I will, give and bequeath unto the said Jane my wife, and her assigns” certain lands, describing them, “To have and to hold all and singular the said freehold lands, messuages and tenements, with the appurtenances, unto the said Jane my wife and her assigns, during her life natural, and after her decease I will and bequeath all that my said messuage or tenement,” describing one of those already mentioned, “*unto Luce Roper and Nicholas Griston, and to the heirs of either of their two bodies lawfully begotten*, I will that the said messuage or tenement shall remain to the right heirs of me the said Robert Huntley for evermore.”

It will be noted not only that “either” is used just as it is in the present case, but also that the words “and to” were used, which plaintiff’s counsel in the present case has the boldness to say are words of futurity and separation. (See p. 41 above.) Also the devise is “unto”, which plaintiff’s counsel in his brief (pp. 48, 75) seems to think important. Moreover, there is a comma between the words indicating the first takers and those indicating the heirs of the bodies, as there is not in the present case. Furthermore, since the devisees were brother and sister and therefore could not marry, the inheritance would be several although otherwise the devisees would take jointly, and thus “either” would have less of a function to perform in going the rest of the way and creating cross-remainders in the heirs of the body or making them take by purchase. It was likewise a case of an estate tail. Further-

more, there was a gift over of a remainder, which was regarded as intended to be upon default of issue of the devisees ("*pur default de tiel issue*", as Anderson puts it, or "for default of such issues of the bodies", as Dyer puts it).

And yet the Court held in effect (1) that the first takers took a fee tail, (2) that the heirs of the body took only by descent and not in remainder or as purchasers, (3) that there were no cross-remainders, (4) but that, although the first takers took jointly, they did so only for life and took the inheritances in severalty, not because of "either" but because, being brother and sister, the devisees could not have heirs of their joint bodies. Even that effect was ascribed to a different cause than the use of the word "either" and much less did that word have the effect of converting the fee tail of the first takers into a life estate in them and a fee simple in the heirs of their bodies.

The facts were, that Nicholas died without issue and afterwards Lucy died leaving issue, a son, William Roper, who also later died. The action was brought by Humphrey Huntley, heir of the testator, against John Roper, administrator of William Roper, for half of the rent under a lease made by the testator and later assigned by the lessee to William Roper. The question was, whether, upon the death of both Lucy and Nicholas, the whole land went to Lucy's son or half went to him and the other half (Nicholas') went under the remainder over (or reversion) to the heir of the testator inasmuch as Nicholas left no issue.

If the argument of plaintiff's counsel in the present case were sound, the Court should have held that the heirs of the bodies of the first takers were to take in any event so that upon the death of both first takers the whole land should go to the issue of the one of the first takers (Lucy) who alone left issue. The Court, however, held that Lucy and Nicholas took jointly for life with several inheritances, and hence that Lucy's half would descend (not go by purchase as a remainder) to her issue and that Nicholas' half would go to his issue, if he had any, but, that, since he had none, it would go over to the heirs of the testator, but that since Nicholas died first and the estate was joint for life, the inheritance of the heir of the testator was in abeyance until Lucy's death, and that therefore he could recover his half of the rent only from the time of Lucy's death.

The report of the case in Dyer is in English, but purports to give only the substance, not the exact language of the devise, as follows:

"To a woman and her brother, and to the heirs of every of their bodies lawfully begotten; and for default of such issue of the bodies," remainder to, etc.

The report in Anderson is in French and likewise purports to give only the substance of the devise as follows: "*a les heirs de chescun (modern chaque) de leur corps loyalment engendres pur default di tiel issue que le di messuage remane a les droit heirs le devisor*".

This is a leading case and is often cited with ap-

proval. The following, with a marginal reference to this case, is found in 2 Shep. Touch. 445-6:

"If one devise land to I. S. and I. D. and the heirs of either of their bodies lawfully engendered; it seems that by this devise I. S. and I. D. shall take and hold as tenants in common and not as joint tenants. And so if one devise his land to I. S. and I. D. thus, I will that I. S. and I. D. shall have my lands in *Dale*, and occupy them indifferently to them and their heirs" (meaning, of course, subject to holding jointly for life), and in the note it is further said that if the devisees may intermarry "they take a joint estate tail".

2. *The gift over "upon default of issue" not only does not militate against but substantially supports the theory of an estate tail.*

(a) Default of issue is merely an event upon the happening of which one devise, that to the first takers in fee tail, is to determine and an alternative devise, that to the trustees, is to take its place or begin. The gift over "upon default of issue" follows and does not control the prior devise. Indeed, the gift over might have been conditioned at the pleasure of the testatrix upon the default of the issue of either one of the first takers or of the survivor of them or of any other person and irrespective of whether the descent under the prior devise was to be to the heirs of the body of both or of each or the survivor. Of course, if the testatrix had specified precisely upon the default of what issue the gift over was to take effect, that might throw some light on the question whether the descent in the prior devise was intended to be to the



issue of both or of each or of the survivor of the first takers. But, as it is, the devise over is to take effect "upon default of issue," without specifying what issue, and hence we are thrown back to the prior devise to ascertain what issue.

(b) Plaintiff's counsel assumes that the devise over is to take effect upon default of all the issue of each of the first takers. From this he infers that if one first taker leaves issue and the other does not, then, since the devise over cannot take effect (on his assumption), the moiety left by the first taker who leaves no issue must go somewhere else, and since, as he assumes, there is nowhere else for it to go, it must go to the issue of the other first taker. Hence, he concludes, there must be cross remainders between the issue of the respective takers, in which case the issue would take by purchase.

His assumptions, however, are without foundation. Not only is it not true that the gift over could take effect only upon default of all issue of both first takers, but even if that were so, it is not true that the moiety of the one dying without issue would have to go to the issue of the other.

Take the first assumption. The established rule is, in the case of a gift over merely upon default of issue, not that the gift over is to take effect only upon the default of all issue of the first takers, but that it is to take effect upon default of such issue of the first takers as would take from the first takers *and only to the extent* that such issue would take. In other words, the gift over follows the prior gift. Hence, if the first

takers would take a fee tail by the entirety, so that the descent would be to the heirs of the survivor alone, the gift over would take effect upon default of the issue of the survivor alone. If the first takers would take the fee tail severally, the gift over would take effect as to one moiety upon the death of one first taker without issue, and as to the other moiety upon the death of the other first taker without issue. If the first takers would take by the entirety for life with several inheritances, the gift over would take effect only upon the death of the surviving first taker and as to one moiety or the other or each according as one or both of the first takers died without leaving issue. It is the same in the case of a remainder over as in the case of a reversion over.

This is illustrated in *Huntley's* case above.

Coke (1 Thomas' Coke on Litt. 183 b; see also 183 a), after explaining holdings for life jointly with several inheritances, says:

"Here the cause of the entry of the donor into a moiety in the case is, that, in as much as the inheritance is several. Therefore, upon the several determination of the estate in tail, the donor may enter."

Bacon (Abridgment, Tit. Joint-Tenants, G.), after describing many kinds of estates tail, especially those held jointly for life with several inheritances, says:

"And in all the cases above-mentioned where the inheritances are several, the reversion depending thereon is several also; and if any of the donees die without issue, the donor shall, after

the death of all the donees, enter into a moiety, or a third part, etc.”

The principle is illustrated in a case (*Irvin v. Stover*, 67 W. Va. 356, 363-4 (67 S. E. 1119) cited by the plaintiff. The devise was to husband and wife “and after them to their heirs.” Of course, as there were words of separation and the rule in *Shelley’s Case* did not obtain in that state, there was a life estate and remainder. But the point is that although the court held that the first takers took only a life estate and that, too, by the entirety and that the heirs took by remainder, it held that only one moiety would go to the heirs of one and the other moiety to the heirs of the other and that there were no cross remainders between.

(c) Now, as to the other assumption, that, if the gift over would take effect only upon default of the issue of both first takers, the result would be cross remainders between the issue of the first takers. That would not be so. The result, if it were clearly stated that the gift over was conditioned upon the failure of issue of both first takers (which is not the case here) would be cross remainders or survivorship between the two first takers themselves and not between their issue. This, of course, would not help the plaintiff, for the first takers alone would take an estate of inheritance and the heirs of their bodies would take, if at all, only by descent.

This is illustrated in an unentitled case in 3 Dyer 303 f-304a (49-50) (73 Eng. Rep. 682). The testator devised the third part of his lands to his oldest

son and the other two parts "to his four younger sons by name, and to the heirs male of their bodies begotten, and if the *infant in ventre sa feme* should be a son, then him to have his fifth part as coheir with his four youngest brothers; and if they all five should happen to die without issue male of their bodies, or any of their bodies lawfully begotten; then he willed that the said two parts should revert, remain, and come to the next heirs of the devisor forever." The sixth son was born after the death of the father and he and three of the other younger sons afterwards died without issue. Here was a clear case where the reversion or remainder was not to take effect except upon a failure of issue of each and all of the first takers. According to plaintiff's counsel, the issue of the surviving younger brother should take the interests of the four deceased younger brothers, by way of cross remainders. The court, however, held otherwise. The court appeared to consider that, as of course was the case, the only possible alternatives were whether the younger brothers took in severalty or with the right of survivorship and it held the latter; in other words, that the surviving younger brother took the whole two-thirds in tail. If the gift over had not been expressly conditioned upon default of the issue of all, the younger brothers would of course have taken jointly for life with several inheritances, and upon the death of one without issue the remainder or reversion would have taken effect as to that one's share alone, but since the gift over was not to take effect except upon default of issue of all, upon the death of one or more



without issue his or their share or shares went by survivorship or cross remainder by implication to the others or other. There was no possibility of his or their share or shares going by way of remainder to the issue of the other or others. (See also *Wright v. Holford*, 1 Cowp. 31 (98 Eng. Rep. 951); *Phipard v. Mansfield*, 2 Cowp. 787 (98 Eng. Rep. 1367), affirmed in 1 Dow. 384; *Atherton v. Pye*, 4 T. R. 710 (100 Eng. Rep. 1259).

(d) What, after all, really is the effect of the words "upon default of issue"? These words, besides indicating the event upon which the devise over is to take the place of the prior devise, may affect either the prior devise or the devise over, the nature of the effect depending upon whether the failure of issue is definite or indefinite. But it is unnecessary to decide in this case what the effect is or whether the failure is definite or indefinite, for, whatever the nature of the effect or the failure, it does not in the least favor the plaintiff's contention, but either favors the defendant's contention or is neutral as to both contentions. The effect may be (a) to enlarge or cut down the prior devise to an estate tail or (b) to determine whether the devise over is a remainder or an executory devise or void.

First, as to the prior devise. Assume that the failure of issue is indefinite. Then, if the prior devise were to the first takers indefinitely, which standing alone would be a life estate at common law, it would be enlarged to a fee tail by the devise over upon default of issue. Or, if the prior devise were to the first

takers and their heirs, which standing alone would be a fee simple, it would be cut down to a fee tail by the devise over upon default of issue. Or, if, as in the present case, the prior devise were to the first takers and the heirs of their bodies, which would be an estate tail, its nature as an estate tail would merely be emphasized by the devise over upon default of issue. All of which favors the defendant's contention for an estate tail.

Assume, on the other hand, that the failure of issue is definite. Then, if the prior devise standing alone would be a fee simple or a fee simple conditional or a fee tail, the devise over upon default of issue would merely make it defeasible. If the definite default did not happen, the prior devise would remain unaffected; if it did happen the prior devise would determine and the alternate devise over would take its place. The prior devise would not be changed to a life estate and remainder. And if the prior devise were a life estate and remainder, it would likewise remain unaffected, except that if the definite default occurred the prior remainder would drop out and the alternative remainder over would take its place. None of which favors either contention.

Secondly, as to the devise over. Assume that the default of issue is indefinite. Then, if the prior devise were a fee tail, the devise over would be a remainder, because a remainder can be limited after a fee tail. If the prior devise were a fee simple, the devise over would be void, because it would be too remote.

Assume, however, that the default of issue is definite: Then, whether the prior devise were a fee simple or a fee simple conditional or a fee tail, the devise over would be an executory devise, taking effect, as already stated, by the way of defeasance of the prior devise upon the happening of the event. And similarly, as already stated, if the prior devise were a life estate and remainder, the remainder would drop out upon the happening of the event and the devise over would take effect as an alternate remainder. None of which favors either contention.

All this is familiar law set forth in numerous text books and cases (see, for instance, 1 Tiffany, *Modern Law of R. P.*, pp. 62-4, 329; Underhill on Wills, sec. 650; 40 Cyc. 1591-2, 1599-1601) and is recognized in Hawaii. *Hemen v. Kamakaia*, 10 Haw. 547, 554; *Ninia v. Wilder*, 12 Haw. 104, 110; *Rooke v. Queen's Hospital*, 12 Haw. 375, 382, 392. As examples of such defeasible fees with executory devises over, see *Hemen v. Kamakaia*, 10 Haw. 547, 554, and *Ninia v. Wilder*, 12 Haw. 104, 110 (fees simple); *Rowland v. Warren*, 10 Or. 129, 132 (fee simple conditional); *Linn v. Alexander*, 59 Pa. St. 43, 46, and *Pearsol v. Maxwell*, 68 Fed. 513, 515 (fees tail).

(e) Plaintiff's counsel cites (Brief, p. 78) *Paiko v. Boeynaems*, 22 Haw. 233, 240, and other Hawaiian cases, which hold that, while a devise to A indefinitely (without words of limitation such as "and his heirs") might be either for life or in fee, with the presumption in favor of a fee, the fact that there is a devise over upon A's death shows that the devise to

him was intended to be for his life. We cannot see what bearing those cases have on a case like the present in which there are words of limitation in the first devise and in which the devise over is not absolute on the first taker's death but only upon default of issue.

(f) Plaintiff's counsel also assumes that "upon default of issue" means a definite default. We contend that it is immaterial for the purposes of this case whether it means a definite or an indefinite default, but, of course, if it does mean, as we contend it does, an indefinite default, this alone, is fatal to the plaintiff's case.

By a rule of construction at common law words naturally indicative of an intent to provide for a gift over upon the death of the first taker without leaving immediate issue of his body—but if he did leave issue then the condition to be forever wiped out—were considered to contemplate an indefinite failure of issue.

To give this construction was, of course, a miscarriage of the intent of the testator, and just as the courts of Hawaii refused to accept the rule in *Shelley's Case*, so they refused to accept this rule of construction. But just as the repudiation of the rule in *Shelley's Case* does not mean that the testator's intent to use words as words of limitation will not be given effect, so the repudiation of this rule does not mean that the court will discard the express intention of the testator and hold that words clearly indicative of an indefinite default of issue shall be construed as words indicating a definite default.

Issue presumptively means heirs of the body or



issue of every degree, irrespective of any formal rule of construction. 2 Jarman on Wills, 5th Ed., 411; 40 Cyc. 1456.

The cases relied on by the plaintiff to show that a definite default is intended are cases involving such expressions as "die without a child," "die without issue," or "die without leaving issue," etc. *Hemen v. Kamakaia*, 10 Haw. 547, 554-8; *Rooke v. Queen's Hospital*, 12 Haw. 375, 399. Such expressions differ from "upon default of issue," "on failure of issue," etc., in that they refer to the death of the first taker, and the words relating to issue are so connected with the words relating to such death as to make them referable to the time of such death or to confine them to the immediate issue of the first taker, while such words as "upon default of issue" do not refer to the death of any person or class of persons at all, but, on the contrary, naturally signify a giving out or general failure of issue. The difference between the two classes of expression was recognized in the *Rooke* case, just referred to, on page 399.

Of course, even these more general expressions might be coupled or connected with death; as, upon default or failure of issue "at the death" of the prior takers. But such is not the case here.

The distinction just pointed out is referred to by Hawkins on Wills, page 216, where in consequence of this distinction he doubts whether the English Wills Act of 1837, which changed the legal presumption that expressions such as "die without leaving issue" imported an indefinite failure, applied to such expres-

sions as "upon default of issue"; because the act was designed to break down construction subversive of intent and not to lay down a rule of construction which would itself disregard expressions of intent to provide for an indefinite failure.

But not only does the expression "upon default of issue" fail to support the construction contended for by the plaintiff; it really gives finality to the normal construction of the devise to the first takers and "the heirs of the body of either" as a devise in fee tail because of the nicety of its consistency with such a devise—a consistency which obtains in no other construction. To spell out the construction which the plaintiff would have given to the devise, viz.: "to the first takers and the survivor of them for life, remainder in fee to the heirs of the body of each, upon default of issue the same to go to my trustees," etc., it is obvious that an ambiguity confronts us at once. We are unable to tell whether the trustees are to take only if the first takers die without issue, or whether the default refers to the issue of the remaindermen. If the intent was, as claimed by the plaintiff, to give alternative remainders to the heirs of the body and to the trustees, it is not only difficult to comprehend why, in a will as carefully drawn as is this one, the provisions in remainder were not placed in contiguity and worded in the alternative, but why the words "default of issue" were used rather than "but if there are no heirs of the body of the first takers." For to give an exact meaning to "upon default" requires that there has been some limitation upon default of which the

devise to the trustees is to come in. No only, however, would the language be ambiguous as to whether the devise over is upon the death without issue of the first takers or upon the death without issue of the remaindermen, but in so far as there is anything tending to relieve this ambiguity it would point toward a devise over upon death of issue of the remaindermen. If we assume that the devise over is upon default of issue of the remaindermen, who, according to plaintiff, are to take in fee simple, the intention of the testatrix is again clouded with doubt. Did the testatrix contemplate a definite or an indefinite default of issue?

On the other hand, by accepting the normal construction of "to the first takers and the heirs of the body of either," the devise not only loses all ambiguity but takes on that nice consistency of expression which marks the entire will. For the most proper way in which to denote a reversion or remainder after an estate in fee tail was to condition the same "upon default of issue" of the tenant or tenants in tail. There could be, therefore, no question of ambiguity arising in the use of this expression in connection with the devise of the estate tail.

How closely interwoven are the devise of an estate tail and the provision for a remainder upon the termination of that estate limited by words expressive of a default of issue is indicated by the Wills Act (1 Victoria, chap. 23, sec. 29), which provides "that in any devise or bequest of real or personal estate the words 'die without issue' or 'died without leaving

issue' or 'have no issue' or any other word which may import either a want or failure of issue of any person in his life time or at the time of his death or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the life time or at the time of the death of such person, and not an indefinite failure of his issue; *unless a contrary intention shall appear by the will by reason of such person having a prior estate tail*, or of the preceding gift being without any implication arising from such words of limitation of an estate tail to such person or issue or otherwise."

It requires no partisan effort to maintain that the use of an expression to carry a limitation over so perfectly in accord with the creation of an estate tail, and unambiguous only in case the previous language is given its normal construction of an attempt to create an estate tail, strongly indicates that the intent of the testatrix was to devise an estate tail to the first takers.

Moreover, the testatrix' general scheme favors an indefinite failure and hence an estate tail. She gave the residue, constituting the bulk of her estate, to trustees for the founding and maintenance of certain schools. Will, Item 13. And, as we have seen, she gave remainders to the trustees in all the many instances in which she gave life estates to others. She left no near relatives and made no provision for those who would be her heirs at law, except that she gave a life interest in certain lands and an absolute interest in certain personal property to her husband. Will,



Items 9, 16. And, even if, on the plaintiff's theory, the heirs of the bodies of the first takers would take by purchase, their estate would be a fee tail and not a fee simple. 2 Jarman, Wills, 62. Hence the estate would be a fee tail, whether in the first takers, on the defendant's theory, or in the heirs of their bodies, on the plaintiff's theory, and there might be an extinction of issue in either case at any time. The most probable and natural thing, therefore, for the testatrix to do would be to make the gift over to the trustees take effect whenever the heirs of the body ran out. As between a reversion to her heirs general, whoever they might be at some future time upon the extinction of issue, and a gift over to the trustees, she obviously preferred the latter. She can hardly be supposed to have intended that if the heirs of the body should be extinct at the death of the first takers the property should go to the trustees, but that if they should become extinct at a later date it should go to her heirs general.

#### IV.

A DEVISE WHICH WOULD BE A FEE TAIL IN ANY PARTICULAR JURISDICTION, IF A FEE TAIL COULD EXIST THERE, WOULD, IF A FEE TAIL COULD NOT EXIST THERE, BE A FEE SIMPLE CONDITIONAL OR, IF A FEE SIMPLE CONDITIONAL ALSO COULD NOT EXIST THERE, IT WOULD BE A FEE SIMPLE.

1. *This is the rule in all other jurisdictions and,*

*subject to a qualification not material to the present case, is held to be the rule in Hawaii.*

The question in each instance is whether the estate would be a fee tail, not at common law, but in the jurisdiction in question, if a fee tail could exist there. If it would be, it logically follows that the estate would be a fee simple conditional or a fee simple, if a fee tail could not exist in that jurisdiction. The cases will be referred to later.

In the case of a direct, express, intentional fee tail (as, to A and the heirs of his body), the question whether the estate would be a fee tail in the particular jurisdiction, if a fee tail could exist there, would be the same as the question whether it would be a fee tail at common law.

If, however, the estate would be a fee tail, if at all, only by the operation of the rule in *Shelley's Case* (as, to A for life and after his death to the heirs of his body), then if the rule in *Shelley's Case* obtained in the particular jurisdiction the question would be the same there as at common law. But, if in the particular jurisdiction the rule in *Shelley's Case* did not obtain the estate would not be a fee tail there, but would be a life estate and remainder, even if a fee tail could exist there, although it would be a fee tail at common law.

Similarly, if the estate would be a fee tail, if at all, only by implication (as, by being enlarged from an indefinite devise or cut down from a fee simple by a gift over upon an indefinite failure of issue), the words (such as "die without leaving issue") which at com-

mon law were held to import an indefinite failure of issue might in the particular jurisdiction be held by the courts or declared by statute to import a definite failure of issue. If therefore in the particular jurisdiction the words would be held to import an indefinite failure of issue, the question whether the estate would be a fee tail, if a fee tail could exist there, would be the same as at common law. But if in the particular jurisdiction the words were held to import a definite failure of issue, they would not enlarge or cut down the estate to a fee tail, even if a fee tail could exist there, but the estate would remain, either a life estate or a fee simple as the case might be.

The courts elsewhere than in Hawaii proceed thus logically in every case. They first ascertain whether the estate would be a fee tail there, if a fee tail could exist there, and then, if they so hold, they further hold that it would be a fee simple or a fee simple conditional, as the case might be, if a fee tail could not exist there.

This would seem to be inevitable even when the result would clearly be contrary to the intention of the testator, as, when the estate would be a fee tail, if at all, only by the rule in *Shelley's Case*. This may be made clearer by reversing the process of reasoning. Ordinarily the process is this: The devise, although in terms a life estate and remainder, would be a fee tail by the rule in *Shelley's Case*, if a fee tail could exist in the particular jurisdiction; hence, since such an estate cannot exist there, it must be a fee simple. Now reverse this as follows: Since a fee tail cannot

exist there, we will not first assume that it can exist there for the purpose of determining whether it would be a fee tail, if a fee tail could exist there, but will assume at the outset that it is a life estate in the first taker and a remainder in fee simple in the second taker, aside from the rule in *Shelley's Case*. Then, however, since the rule in *Shelley's Case* obtains there, such life estate in the first taker and remainder in fee simple in the second taker are united into a fee simple in the first taker. Thus the same conclusion is reached by each process. The unfortunate conclusion in such case is the result, not of the logic of holding that what would be a fee tail, if a fee tail could exist, would be a fee simple, if a fee tail could not exist, but of adhering to an archaic rule, namely, that in *Shelley's Case*, which in most instances thwarts the intention. The logic of the reasoning might be illustrated similarly in the case of what would be a fee tail, if at all, only by implication.

It is hardly necessary to add that the rule in *Shelley's Case* has no application to an express fee tail like the present. The difference between the abolition of that rule and the abolition of estates tail is well brought out in *Duffy v. Jarvis*, 87 Fed. 731, 734. (See, also, *Rooke v. Queen's Hospital*, 12 Haw. 375, 390; *Robinson v. Aheong*, 13 Haw. 196, 199; *Thurston v. Allen*, 8 Haw. 392, 401.) It is equally apparent that the subject of the creation of fees tail by implication is not involved in a case like the present, where the estate is an express fee tail. It may be added also that in Hawaii the courts have not ad-



hered either to the rule in *Shelley's Case* or to the rule which requires that certain words which naturally import a definite failure of issue shall be held to import an indefinite failure. Hence, in Hawaii the logical rule should in all or nearly all cases that would be likely to arise coincide with the actual intention of the testator. In Hawaii also fees simple conditional as well as fees tail cannot exist, and hence the question is solely whether an estate which would be a fee tail, if a fee tail could exist, is a fee simple or a life estate and remainder.

In Hawaii, however, the Court has taken the position that it need not proceed in all cases strictly logically, as is done in all other jurisdictions in which the question has arisen, but that, even if the estate would be a fee tail in Hawaii, if a fee tail could exist there, it might, nevertheless, be held to be a life estate and remainder, if there is sufficient in the will or deed to show that that result would be more nearly in accord with the real intention of the grantor or testator; in other words, that there might be sufficient in a deed or will to show that, although the estate would be a fee tail, if a fee tail could exist, it should nevertheless be held to be a life estate and remainder, if a fee tail could not exist.

Conceivably such might be the case, as, for instance, if the grantor or testator after creating what would be an estate tail, if an estate tail could exist, should add in so many words that if it should be held that an estate tail could not exist he desired that the devise should be held to be a life estate and remainder; and

it may be that sufficient words could be used short of such a direct declaration to overcome the otherwise normal or logical result.

But, while the conclusion reached in *Nahaolelua v. Heen*, 20 Haw. 372, and *Boeynaems v. Ahleong*, 21 Haw. 699, which construed the same deed and merely followed the *Nahaolelua* case without further discussion, was doubtless gratifying under the special facts of that case and more conformable with the real desires of the grantor than the opposite conclusion would be, and perhaps could have been reached logically, it is not clear how the court could reach that conclusion logically after finding that the estate would be a fee tail, if a fee tail could exist in Hawaii. Aside from the question whether the court should not in those cases have given effect to the trust attempted to be created, it would seem that in order to be logical the court should either have held that, taking the deed as a whole and in view of all the circumstances, the estate created by it would not be a fee tail, even if a fee tail could exist in Hawaii, or else that, holding as it did that the estate would be a fee tail, if a fee tail could exist there, it was a fee simple, since a fee tail could not exist there. In other words, it should have decided the case by logic and not by conjecture, and in this the attorney for the plaintiff appears to agree with us. (See his brief, pp. 85, 86.)

The decision in the *Nahaolelua* case, which alone purports to give the reasoning for the conclusion, is meager and unsatisfactory even as far as it goes. This may be due to the extremely inadequate way

in which the case was presented to the court, if we may judge from the briefs on file in that case.

However that may be, the court did decide that if the estate would be a fee tail in Hawaii, in case such an estate could exist there, it would, since such an estate cannot exist there, be either a life estate and remainder or a fee simple "according to which appears to most nearly carry out the intention of the testator", and that this intention is to be determined "by the established rules of construction." All that it can be taken to have held is that in that particular case the special facts were such as to justify or call for a conclusion that the estate should be held to be a life estate and remainder. It did not go further and attempt to state what the normal rule would be, to be overcome or not according to the special facts of the case, or to state under what circumstances the estate should be held to be a life estate and remainder or a fee simple. The reiterated statement of plaintiff's attorney (see his brief, pages 80, 82, 85-87), that the court in effect held that if it appeared that a fee simple was not intended (which is necessarily the case when a fee tail is intended, and it is equally true that in such case a life estate and remainder is not intended) the estate must be a life estate and remainder, is absolutely without foundation. In the present case, however, the court, after full consideration of the matter, announced (23 Haw. 747, 760; Tr., pp. 56-7) in substance as the normal rule that the estate would be a fee simple and that it would require controlling context to take the case out

of that rule and make the estate a life estate and remainder.

Thus, the normal rule in Hawaii is the same as elsewhere, and the qualification added to that rule in Hawaii cannot affect the present case, inasmuch as, even if the *Nahaolelua* and *Boeynaems* cases were correctly decided under the qualification of that rule, they are easily distinguishable from the present case, because in those cases the provisions of the deed were about as potent short of a direct declaration as provisions of that kind could be in the direction of a life estate, and because in the present case not only is there absolutely nothing pointing in the direction of a life estate, but on the contrary the provisions of the will and codicils taken as a whole, so far from overcoming the normal rule or detracting from the force of its application, add tremendously to the strength of its application, so much so that, even if the normal rule were the other way, there is enough in the will and codicils to overcome it.

2. *The reasons for this rule are overwhelmingly conclusive.*

Take the case of an estate tail by implication cut down from a fee simple by a gift over on an indefinite failure of issue; as, to A and his heirs, with a gift over. How possibly could this, in the absence of other controlling context, be converted into a life estate and remainder? It is in terms a fee simple. The gift over, however, shows an intention to qualify or limit the heirs to the lineal heirs or heirs of the body. It is



much the same as if the testator had said, "I devise the property to A and his heirs, but I direct that there shall be no descent to collateral heirs." Where estates tail cannot exist, it would be an attempt at an unlawful restraint on inheritance and would be inoperative, leaving the estate a fee simple, just as would be the case if the attempt had been to impose an unlawful restraint on alienation. See *Simerson v. Simerson*, 20 Haw. 57, cited with approval in the *Nahaolelua* case, 20 Haw. 372, 377.

Likewise, take the case of a direct, express fee tail; as, to A and the heirs of his body, as in the present case. Here, also, is the plain case of an estate of inheritance—what, indeed, would be a fee simple but for the added words "of his body" designed to restrain the course of descent to a particular class of heirs and prevent a descent to other classes. But since, in Hawaii, such a restriction cannot be made, the restrictive words cannot be given effect and must be held inoperative, just as an attempted restraint on alienation of a fee simple by deed or will would be ineffective, and the estate must necessarily be a fee simple.

Again, only three courses are open. In a devise to "A and the heirs of his body," in a jurisdiction in which fees tail are not allowed, either the unlawful part alone of the attempted restraint, that is, the words "of his body" might be held nugatory, which is the natural and logical course, thus leaving the devise to "A and his heirs"—a fee simple; or, the whole phrase "heirs of his body," might be held nugatory, the

words "heirs" being regarded as tainted to that extent by the words "of the body," thus leaving the devise simply to A, which would be held to give A a fee simple in Hawaii, where such a devise without the word "heirs" is held to be a fee simple in the absence of controlling context (*Keanu v. Kaohi*, 14 Haw. 142), and even if it should be held to give A only a life estate it would nevertheless not give the heirs of his body any estate; or, the whole devise to "A and the heirs of his body" might be held nugatory or void on the theory that all these words went to make up the intended fee tail and that, since the fee tail could not exist, the whole devise fell, in which case not only would the devise be defeated as to the plaintiff as well as to the defendant but the defendant in this case would have a fee simple by adverse possession. In no case, therefore, could the "heirs of the body" take except by descent. In every case in which the devise could be given effect, the first taker would take a fee simple.

Further, as has already been emphasized in this brief, the words "heirs of the body" in a devise of this kind—a direct, express fee tail—are words of inheritance denoting the *quantum* of estate in the first taker. If, therefore, in the absence of controlling context, the court should hold that the estate would be a life estate and remainder, it could do so only by taking the liberty of changing words which the testator intended as words of inheritance to words of purchase. To hold that in a devise to "A and the heirs of his body," the word "heirs" was intended as a word

of purchase would be as absurd as to hold that in a devise to "A and his heirs" general, the word "heirs" was intended as a word of purchase. If "to A and the heirs of his body" means "to A for life remainder in fee simple to the heirs of his body," then "to A and his heirs" means to "A for life, remainder in fee simple to his heirs." This would be to change what was intended as a word of inheritance to a word of purchase; it would be to change what was intended as an estate of inheritance in the first taker to a life estate; it would be to create an entirely new and additional group of devisees, the heirs of the body, to take by direct devise when the testatrix did not intend to make a direct devise to them.

Further still, to hold that the devise would be a life estate and remainder, either would be illogical or else would amount to getting out of one difficulty only to get into another. For, if the devise were held to be a direct devise of a remainder to the heirs of the body, it would be a fee tail and not a fee simple in them, just as a direct devise to the heirs general of a person would be a fee simple in them. 2 Jarman, Wills, 5th Ed., 62. Hence, the court, in order to be logical, would have to repeat the process and hold that, since a fee tail could not exist in Hawaii, the devise to the heirs of the body would be a life estate in them and a remainder in the heirs of their bodies, and so on. In other words, the fee tail would have to be converted into a succession of life estates for as long a time as the rule against perpetuities would permit and then cease. And if it should be urged that the testator in-

tended that the heirs of the body should receive a benefit, it might be replied not only that that was no more the case than that he intended the heirs to receive a benefit in a devise to A and his heirs, but also that he intended just as much that the successive heirs of the body all the way down the line should receive a benefit, and if the first heirs of the body should be given a fee simple this would defeat the intention, if there was any such intention, as to all those further down the line.

Again, there is comparatively little difference between the different kinds of estates of inheritance. The important fact is that they are all estates of inheritance and therefore in a different class from life estates. A fee tail is merely a species of the genus fee. In a devise to "A and the heirs of his body," it is obvious that the testator intended to devise to A an estate of inheritance. Hence, if in a particular jurisdiction, as in Hawaii, only one kind of an estate of inheritance is allowed, namely, a fee simple (whether absolute or qualified), the devise must be held to be a fee simple, for there is no other estate of inheritance. It would have to be the only estate of inheritance there is.

Again, as suggested in *Rooke v. Queen's Hospital*, 12 Haw. 375, 393, since fees tail were the product of the statute *de donis*, in so far as they differed from fees simple conditional, the most natural course would be to hold that, if fees tail could not exist in Hawaii, the estate would be what it would be before that statute, namely, a fee simple conditional, which upon



performance of the condition, that is, the birth of issue, became a fee simple without the condition. And as we shall see presently the Oregon, Iowa and South Carolina courts took the view that if fees tail could not exist, the estates would be fees simple conditional, if the latter could exist. A fee simple conditional is even nearer than a fee tail to a fee simple. If fees simple conditional also, as well as fees tail, cannot exist, we have to pass on to a fee simple, as the next and only logical step, as the Oregon court held.

All the incidents of an estate tail lead the same way. This is especially true of the power to alien in fee simple. What more extensive dominion can there be over a piece of land or more indicative of the extensiveness of the estate than the power to convey it away in fee simple? The existence of estates of inheritance and the right or power to alienate them was a matter of gradual growth, until it came about that the words "heirs" or "heirs of the body" were used in a gift to "A and his heirs" or to "A and the heirs of his body" merely to donate an estate of inheritance in A and that the heirs or heirs of the body should inherit from A only in case A did not dispose of the property before he died. It is true that an attempt was made by the statute *de donis* to deprive a tenant in tail of the power of alienation and that the attempt was successful for a couple of centuries, until 1472, since when such estates could be aliened in fee simple by means of a common recovery even before birth of issue and so as to cut off the heirs of the body and the

reversion of the donor, and this power of alienation came to be an inseparable incident of an estate tail, and a common recovery came to be one of the recognized assurances or modes of conveyance of the realm. *Croxall v. Sherard*, 5 Wall. 268, 285; *Weld v. Williams*, 13 Metc. 486, 494; 1 Williams, R. P., 21st Ed. 253-4. It follows that, if a fee tail cannot exist, it should be converted into its nearest likeness, a fee simple, which carries the right to alienate in fee simple, rather than into something that has no resemblance to it, a life estate and remainder.

Plaintiff's counsel, however, seems to take the position that it is immaterial for the purposes of this case that fees tail could be barred by common recovery for the reason that, as he says, they could not be barred by deed, and that common recoveries are not recognized in Hawaii. As to this, one of two things is certain: If a fee tail could exist in Hawaii, either the court would hold that its inseparable incident, a bar by common recovery, could exist there also, or else, if the court should hold that that remedy is too fictitious or out of date or inharmonious with Hawaiian judicial procedure to obtain there, it would hold that the alienation could be by deed. It is inconceivable that the court could take the backward step of holding that a fee tail could exist in Hawaii and at the same time that its inseparable and most salutary incident of alienability could not exist there. We presume that in Hawaii the court would choose the method by deed rather than that by common recovery, as that would be in line with the tendencies

of that court. And that would naturally follow from the reasoning upon which the courts of New Hampshire and Oregon, presently to be referred to more fully, which the Supreme Court of Hawaii adopted in the *Rooke* case (12 Haw. 375, 391-2), based their decision that fees tail could not exist in their respective jurisdictions. For, they held that the reason why that was so, was that such statutes as those of descents and wills made those estates practically fees simple inheritable and alienable like other fees simple. In most states in which fees tail are still recognized, they are by statute made alienable in fee simple by deed. But in some states at least, the courts have so held without the aid of statute. For instance, in *Ewing v. Nesbitt*, 88 Kan. 708 (129 Pac. 1131, 1134), the court, taking this view, said:

“Fines and recoveries, however, are not adapted to any of our needs, are inconsistent with the Code of Civil Procedure and consequently cannot be resorted to. \* \* \* The effect of these indirect, fictitious, and operose proceedings was merely that of a deed of record, and the same end may now be accomplished by an ordinary conveyance. The fiction and the form alone are obsolete. The substance of the proceeding (a conveyance) and the essential character of the estate tail (the right to convert the estate into a fee simple by a conveyance) are preserved.”

The other principal incidents of fees tail likewise bring them into close resemblance to fees simple as against life estates. For instance, they are without inpeachment of waste, and dower and curtesy may be had in them. 2 Bl., Com. 115-6.

All the presumptions that would strengthen the view that the estate should be held to be a fee tail, if such an estate could exist, equally support the view that it should be held to be a fee simple, if a fee tail could not exist. See Subdiv. 2 of Part II of this brief.

See also on the foregoing matters the decision of the Supreme Court in this case. 23 Haw. 747, 760; Tr., p. 57.

3. *The decisions are unanimous that what would be a fee tail at common law would be a fee simple (or a fee simple conditional where this is recognized) in the states in which fees tail do not exist and in which the question has been decided uncontrolled by statute.*

In most states fees tail are abolished by statute and usually the statutes declare also what the estates shall be. In some states there are neither statutes nor decisions on the subject. But in every state in which it has been held that fees tail do not exist and in which the question has arisen and has not been determined by statute, the courts have held that the estate would be a fee simple or a fee simple conditional, according as fees simple conditional could or could not exist. We challenge plaintiff's counsel to produce a single decision from a single state that either in its conclusion or in its reasoning points in the direction of a life estate and remainder.

The leading case is *Jewell v. Warner*, 35 N. H. 176. The devise was to A and B, "to be theirs, and the heirs of their body and their heirs' assigns." This would be an express fee tail at common law. There was no statute in New Hampshire either abolishing fees tail or declaring what they should be. The rule



in *Shelley's Case*, although it had been abolished, was in force at the date of the will, but had no application because the estate was an express fee tail, and that rule was not referred to in the case. The court held that neither fees tail nor fees simple conditional could exist in that state and especially on the ground that the statute of descents fixed the course of descent and that a testator could not impose restrictions on it or limit it to a narrower line than that fixed by the statute, and hence that any such restrictions would be inoperative and the estate would be a fee simple. We quote from page 185:

"The distinction between estates tail and estates in fee simple, which it was the great object of the statute *de donis* to maintain, being thus abolished, all the restrictions imposed by that statute upon the right of alienation are swept away, as being inconsistent with the nature of fee simple estates. And in the same way the distinction which existed before the statute *de donis* between estates in fee simple and estates in fee simple conditional, is also abolished, and the grantor of real estate is deprived of all power to limit the course of descent. If property descends at all it must descend according to our law to the children and next of kin. Any attempt, therefore, to limit the descent of estates here to any other course of descent must be futile. *The restrictive words 'of the body' or 'male or female of the body' or 'by the body of any particular wife or husband,' added to 'heirs' are simply inoperative. They create neither an estate tail nor a fee simple conditional but an estate in fee simple, as if they had been entirely omitted.*" (Italics ours.)

The court also (page 182) referred to the liability to be defeated by common recoveries and fines as "an

inseparable quality of an estate tail," and said (p. 188) that "by the descent to heirs generally they were become estates in fee simple, and as such liable to alienation by deed." The court also referred to the statute in regard to wills, which permits testators to devise their estates and which therefore are inconsistent with the nature of estates tail. The court further referred to the nature of such estates as not in keeping with present tendencies towards the alienability of estates.

It is of special significance that the Supreme Court of Hawaii in the *Rooke* case (12 Haw. 375 at 391, 392, 394) cited and approved this New Hampshire case and, indeed, based solely upon the authority and reasoning of that case its decision that neither fees tail nor fees simple conditional could exist in Hawaii.

In *Crockett v. Robinson*, 46 N. H. 454, the will was made before the rule in *Shelley's Case* was abolished, and the language was such that the estate could be a fee tail only by the operation of that rule. Yet even then the court, holding as it had to, that, if fees tail could exist there, the estate would be a fee tail under the law of that state as it was at the date of the will, held that, since fees tail could not exist there, the estate became a fee simple. Of course, if it had not been for the rule in *Shelley's Case*, it would have been a life estate and remainder.

In *Merrill v. Baptist Union*, 73 N. H. 414, the estate at common law would have been a fee tail cut down from a fee simple by implication by a gift over on extinction of lineal descendants, but the estate was held to be a fee simple, following the above mentioned two

earlier decisions. The rule in *Shelley's Case* had been abolished before the date of the will, and of course would not apply to such a fee tail by implication anyway, and was not referred to in the case.

In *Calder v. Davidson*, 59 S. W. (Tex.) 300, the deed was to A "and the heirs of her body" by her then husband. Estates tail had been abolished by the constitution but there was no statutory or constitutional determination of what they should be converted into. It being a plain case of an express estate tail, the rule in *Shelley's Case* had no application. The court, however, had more or less to say about the rule and seemed to be somewhat wobbly in regard to it. It said that the rule was law in that state, but that it did not apply to estates tail at common law and that in that state if the grantor clearly evinced an intention to create a life estate and remainder, that intention would control notwithstanding that rule, and that the rule was invoked usually only where there was an intention to give a life estate and remainder, and that no case had been cited in which the question of the rule had been raised on a deed "of such unequivocal import as the one under consideration." What it actually held was that the estate would be an estate tail special at common law, but that, since such estates were abolished in that state, it would be a fee simple. It said (p. 302) :

"The granting clauses are absolute and unrestricted, and there is nothing in the granting clause or the deed considered as a whole which may be fairly held to evince an intention to create a life estate with remainder over to any person.

\* \* \* There is nothing in the deed which can be held to restrict or modify the ordinary legal meaning and effect of the words 'heirs of her body by R. J. Calder.' At the common law the language would have created a fee tail special, and, since estates tail are forbidden in this state, the deed must be held to have vested a fee simple title in the first taker."

In *Rowland v. Warren*, 10 Or. 129, the devise was to "Mary E. Hembree \* \* \* to her and her body heirs forever." As this was an express estate tail, the rule in *Shelley's Case* had no application to it even if it were law in that state, and was not mentioned. The court referred to the statute *de donis* as having converted fees simple conditional into fees tail mainly by taking away the power of alienation, and held, on reasoning similar to that in the earlier New Hampshire case, to which it referred, that the various statutes relating to descents, wills, conveyances, and sales on execution and by administrators, had not only displaced alienations by common recoveries but by implication had made all estates of inheritance subject to a general power of alienation and thereby impliedly repealed the statute *de donis* and consequently estates tail. It therefore held that, since an estate tail could not exist there, the estate would be what it would be before the statute *de donis*, namely, a fee simple conditional, if fees simple conditional could exist there, and that if such fees could not exist there, it would be a fee simple, but that in view of the facts of that case, it was unnecessary to decide whether fees simple conditional could exist there or not.



In *Pierson v. Lane*, 60 Ia. 60, the deed was to A "and the heirs of her body begotten by said husband." This of course would be, as the court held, an express fee tail special at common law, but counsel in that, as in the present case, contending for a life estate and remainder, tried to ring in the idea of the rule in *Shelley's Case*, and contended that the estate could not be an estate of inheritance except by the operation of that rule and that the rule was not in force in that state. The court, however, said that that rule applied only where there was in terms a particular grant and a remainder and that it had no application to an express fee tail. It then held that as the object of the statute *de donis* was to place restraints on alienation, its purpose was foreign to the genius and policy of our institutions and hence that estates tail could not exist there. It did not say whether fees simple conditional could exist there, but seemed to assume that they could and that the estate became such a fee, and held that since the devisee had heirs of the kind specified, her fee became absolute and her deed carried the entire estate.

In *Archer v. Ellison*, 28 S. C. 238 (5 S. E. 713), the deed was to A "and the natural heirs of her body." This also was the case of an express fee tail, to which the rule in *Shelley's Case*, if it were law there, would have no application. The court, however, without mentioning the rule, called attention to the marked difference between such a case and one where there was in terms a particular estate and a remainder. It seems that the statute *de donis* never obtained in South Carolina, but that fees simple conditional were recognized

there, and it was held that the estate was such a fee and that it could be conveyed by a married woman under an act permitting her to make conveyances of her estates of inheritance and said that there was "but little difference between an estate in fee simple and an estate in fee conditional." There can be no doubt that in this and the Iowa case the courts would have held the estates to be fees simple if fees simple conditional could not exist there.

In Connecticut a unique view is taken. As a result of a peculiar rule against perpetuities, at first adopted by the courts as a part of the common law of that state and afterwards embodied in a statute, it was held that an estate tail could not continue beyond the immediate issue of the first taker. Hence, although they held that estates tail and fees simple conditional strictly speaking could not exist in that state, they held that an estate which would be a fee tail at common law would in that state be substantially a fee tail as long as it could be, that is, until it got to the first issue, and that when it got there it would become a fee simple since it could no longer exist as a fee tail. *Hamilton v. Hempstead*, 3 Day 332, 339; *Whiting v. Whiting*, 4 Conn. 179, 181; *Goodman v. Russ*, 14 Conn. 210, 216; *St. John v. Dann*, 66 Conn. 401, 408.

4. *Similar unanimous decisions relating to personal property are strictly analogous and lead to the same conclusion.*

Estates in personal property may, of course, be either absolute, corresponding to an absolute or fee

simple estate in real property, or for life and remainder. That is so in Hawaii as well as in other jurisdictions. *Damon v. Dickson*, 7 Haw. 694, 695. But they cannot be in tail. Hence, when words are used with reference to personal property, which if used with reference to real property would create an estate tail, the situation in the case of personal property at common law or everywhere is precisely the same as it is in the case of real property in a particular jurisdiction in which estates tail are not recognized. But it is everywhere held, both in England and America, that, since an estate tail cannot exist in personal property, words which would create such an estate in such property, if it could exist, create an absolute estate and not a life estate and remainder.

The rule is stated thus by Jarman (2 Wills, 5th Ed., 562) :

"It has been established by a long series of cases, that where personal estate \* \* \* is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail \* \* \* *that being the only mode in which personalty can be dealt with in order to make the interest in it analogous to an estate tail.*" (Italics ours.)

Of course, if the bequest would be an express estate tail, if such an estate could be created in personal property, the case would be clear.

But even if the language used would apparently create an estate tail only by operation of the rule in *Shelley's Case*; the estate would likewise become abso-

lute, because an estate tail on personal property can not exist. Such a case was *Elton v. Eason*, 19 Ves. Jr. 73, 78, in which the court said:

“It is clearly settled that a bequest of personal property to a man for life, and afterwards to the heirs of his body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate tail in land, gives the whole interest in personal property; which is incapable of being entailed.”

Of course, in a jurisdiction in which, as in Hawaii, the rule in *Shelley's Case* does not obtain, such a bequest would be a life estate and remainder.

So, also, if the bequest would be a fee tail only by implication; as, to A and his heirs, with a gift over upon an indefinite default of issue, thus cutting down to a fee tail what would otherwise be a fee simple, the devise would be absolute in the first taker, if a fee tail could not exist. Such a case was *Hall v. Priest*, 6 Gray, 18, 21, 22, in which both real and personal property were involved, and it was held that since fees tail could exist in real property and could not in personal property in that state, the devise would be a fee tail in respect of the real property and absolute in respect of the personal property.

Of course, also, if the gift over upon default of issue were upon a definite default, whether so expressly or because words which at common law would be construed as importing an indefinite default are held or declared by statute in the particular jurisdiction to import a definite default, the result would be different.



In each instance, in the case of personal property as well as in the case of real property, the courts first find whether the estate would be an estate tail, if such an estate could exist, and then, if they find it would be, they hold that it is absolute in the first taker, in case an estate tail cannot exist. They do not reverse the process of reasoning and hold that because estates tail cannot exist the words in question must be construed to be words of purchase and not of limitation. Nor do they hold that, since estates tail cannot exist, they, the courts, can make a new devise or bequest according to what they think the testator might have done if he had known that estates tail could not exist.

In *Smith's Appeal*, 23 Pa. St. 9, the devise was of both real and personal property in such a way as to create a fee tail, if a fee tail could exist, by implication by reason of a gift over upon death without issue (indefinite default) after what would otherwise be an absolute estate, although the word "heirs" was not used. The court held that the estate was an estate tail in the real property and an absolute estate in the personal property. It said in regard to the latter (pp. 10, 11) :

"Now as to the personal property. Let it be noticed that the legacy is in terms absolute, and that it is qualified only by the bequest over on his death without issue. But these are words of entailment and therefore, when applied to personal estate, they pass the absolute property. \* \* \* A different construction is usually put upon the phrase 'dying without *leaving* issue,' when applied to personal property. \* \* \*

"It is a general, not to say universal rule, that words which, when applied to land, would create

an estate tail, will, when applied to chattels, pass the entire interest. How can it be otherwise?  
 \* \* \* A devise of land to a man and his issue is therefore good; but of chattels it is, *prima facie*, bad as to issue; for that word unexplained, must be taken in its technical sense, as a word of limitation, and not of purchase.

“There is nothing in this devise to take it out of the general rule. Not one word indicates an intention to limit the interest of the first takers to life.”

The court then, as if to emphasize or expand its question “how can it be otherwise?” proceeded to give a number of reasons, in the quotation from that case in Subdivision 2 of Part II of this brief, to show that the estate could not be held to be a life estate and remainder.

The analogy between personal property as respects estates tail at common law and real property as respects such estates in a jurisdiction in which such estates cannot exist in real property, was recognized by the Supreme Court of Hawaii in the case in which it was held that such estates in real property cannot exist in Hawaii (*Rooke v. Queen's Hospital*, 12 Haw. 375, 400), and also in the present case, 23 Haw. 747, 760; Tr., p. 56.

5. *Analogous decisions at common law relating to real property necessitate the same conclusion.*

At common law lawful restraints or limitations on the course of descent were confined to heirs of the body. They might be the heirs of the body, or heirs of the body by a particular wife, or heirs male or heirs

female of the body, or heirs male or female of the body by a particular wife, etc. Thus there might be fees tail general or special or more special still. But similar restrictions or limitations of the heirs general were not allowed. For instance, an estate could not be limited to A and his heirs male or to A and his heirs female, so as to make the descent to the heirs male (or female), whether descendant, ascendant or collateral. They could be limited to the heirs male (or female) only when also limited to the heirs descendant, thereby making an estate tail. What, then, would be the effect if an attempt should be made to limit the descent to a certain class of the heir general? There can be only one answer. The words expressive of such an unlawful restraint would be futile or inoperative and the descent would be to the heirs general, creating a fee simple general instead of a fee simple special, if such an expression may be used. And yet, on the plaintiff's reasoning, the court should hold in such case that the devise would be to the first taker for life with remainder in fee simple to his heirs male!

Now, a fee simple conditional or a fee tail is a fee with the course of descent limited to a certain class of the heirs general, namely, to the heirs of the body or to some particular class of the heirs of the body. If that is allowable, well and good; a fee simple conditional or a fee tail results. If that is not allowable any more than a limitation to some other particular class of the heirs general, the limitation is merely inoperative and the fee is a fee simple. It would be

the same if a limitation were allowable only to the heirs of the body and not to the heirs male of the body. In such case the word "male" would be inoperative and the estate would be a fee tail general.

Or, to look at it in a slightly different way, a freehold estate is either an estate for life or an estate of inheritance. The word "heirs" indicates that it is an estate of inheritance. Any additional words purporting to restrict the heirs to a particular class are effective if recognized by the law and ineffective if not recognized. Holding that the additional words cannot be given effect, does not change the estate from an obviously intentional estate of inheritance in one person to an arbitrary life estate in that one and an estate of inheritance in another to whom no direct devise was intended.

Thus, the case of a devise to A and the heirs (or heirs male) of his body in a jurisdiction in which a restraint of the heirs general to the heirs of the body, that is, in which a fee tail, is not recognized, is exactly like the case of a devise to A and his heirs male at common law where such a restraint from the heirs general to the heirs male is not recognized. Hence, the effect in both cases must be the same. The unlawful restraint is inoperative and the estate, being an estate of inheritance, is a fee simple, which is the only estate of inheritance recognized in Hawaii.

Littleton says (Co., Litt., Sec. 31):

"But if a man give lands or tenements to another to have and to hold to him and to his heirs males, and to his heirs females, he, to whom such a gift is made, hath a fee simple."



And Coke says (Co., Litt., Sec. 31, p. 27 b) :

“Littleton’s reason being shortly this. Whosoever hath an estate of inheritance, hath either a fee simple or a fee tail; but where lands be given to a man and his heirs males, he hath no estate tail and therefore he hath a fee simple.”

See also 2 Bl. Com. 115.

Indeed, there is little difference between the various fees. They are simply different species of the same genus. As Littleton says, “all inheritances were fees simple” before the statute *de donis* (Coke, Litt., Sec. 13), referring to which Coke comments, in the same section, “Here fee simple is taken in his large sense, including as well conditional or qualified, as absolute, to distinguish them from estates in tail since the said statute.” And the difference between qualified (base or determinable) fees and conditional fees (fees simply conditional and fees tail) is really that the former are fees simple conditioned as to duration and the latter fees simple conditioned as to the course of descent. And even fees tail were not so much created as preserved by the statute, fees simple conditional also having previously been called fees tail.

In *Idle v. Coke*, 2 Salk. 620 (91 Eng. Rep. 525), the court said :

“A gift to H and his heirs males, or a gift to H and his heirs females, is not an estate tail; because it is not, nor does it appear of whose body they are to issue. At common law this would not be a fee conditional; and the statute *de donis* does not create estates tail, but preserves them; a fee at common law was either absolute or restrained;

those restrained fees were either restrained as to duration, as a gift to A and his heirs, while such a house stood, etc., which was a base fee; or restrained as to what particular heirs, or of whose body issuing should inherit, which was a fee conditional, and is by the statute turned into an estate tail; *ergo* this is a fee simple at common law, and is so at this day; for these are words to create an inheritance, but none to restrain that to issue or heirs of the body of the party."

In *Doe v. Martyn*, 8 B. & C. 497, 511 (108 Eng. Rep. 1127, 1132), the limitation was by way of remainder to "the use of the right heirs male of Thomas Martyn." The court said:

"The first question in this case is, what is the effect of the limitation to the use of the right heirs male of Thomas Martyn? Whether those words are words of limitation or words of purchase? It is conceded, and rightly, by Mr. Fraser, that they were to be taken as words of limitation, unless a contrary intention were manifest. \* \* \* I cannot see any such contrary intention. Were I at liberty to conjecture, the opinion I should form would be, \* \* \* that he unintentionally omitted the words to show of whose body they were to be the heirs male. The consequence of this would be, that these would be words of limitation, that the word 'male' must be rejected, and that under these words Thomas took immediately the ultimate remainder in fee."

6. *Hawaiian statutory and case law both require the same conclusion.*

(a) By Section 1 of the Revised Laws, enacted in 1892, "The common law of England, as ascertained by English and American decisions, is declared to be

the common law of the Territory of Hawaii in all cases," except certain specified classes of cases. Within the meaning of this statute, the common law consists of principles or a system of legal logic rather than a code of set rules, and is to be ascertained by American as well as English decisions. *Macauley v. Schurman*, 22 Haw. 140, 144, and cases there cited. And, as we have seen, by unanimity of such decisions, both American and English, whether directly in point or by analogy on principle or logic, an estate which would be a fee tail, if a fee tail could exist, would be a fee simple, if a fee tail could not exist.

(b) In the *Nahaolelua* case (20 Haw. 372), the court held not only that the estate would be either a fee simple or a life estate and remainder according to which appears to most nearly carry out the intention, but also that this is "governed by the established rules of construction," and we have seen that the established rules of construction require that what would be a fee tail, if a fee tail could exist, shall be held to be a fee simple, in the absence of controlling context.

(c) In the *Rooke* case (12 Haw. 375, 391-2), the main basis of the decision that fees tail could not exist in Hawaii was that under the Hawaiian statute they must descend to the heirs general and hence must be fees simple. The court relied on the New Hampshire case, in which it was held, as already shown (35 N. H. 176, 188) that "by the descent to heirs generally (under the statute of descent) they (fees tail) were become estates in fee simple, and as such alienable by deed."

7. *Statutes on the subject favor a fee simple in the first taker.*

While statutory declarations as to fees tail and their incidents are in a sense arbitrary or artificial, it is instructive to note their trend, and the Supreme Court of Hawaii has often referred to the state of modern thought on a given subject as embodied in statutes as worthy of consideration in determining questions presented to it in cases where the common law is not suited to present conditions. See *Branca v. Makua-kane*, 13 Haw. 499, 505.

Many of the text books purport to classify the state statutes on the subject of estates tail, but all are inaccurate and incomplete. One of the better and more recent statements may be found in 2 Underhill, Wills, Sec. 654.

An original examination of the statutes and decisions of all of the states, so far as available in Hawaii, discloses, in general and subject to variations in details, that of the forty-eight states, thirty have statutes or decisions that either make the estate a fee simple in the first taker or else give him the full power of alienation in fee simple by deed, two have statutes that appear to give the first taker an estate of inheritance, subject to dower, etc., but without the power of barring the heirs by conveyance, seven have statutes which make the estate a life estate in the first taker and a fee simple in the second taker, and nine have neither statutes nor decisions on the subject. In the majority of the first group the estate is made a fee simple outright. In all except one in each of the sec-



ond and third groups the rule in *Shelley's Case* obtains, and in several of these it is not the heirs of the body according to the state statute of descent who are to have the remainder, but those who would be the heirs at common law—the eldest son and not all the children.

While an arbitrary rule that in all cases the estate shall be a fee simple in the first taker defeats the probable actual intention in cases in which the estate would be a fee tail only by the rule in *Shelley's Case*, and an arbitrary rule that in all cases the estate shall be a life estate and remainder defeats the intention in cases in which the estate would be a direct, express fee tail, it appears that in more than three-fourths of the states the preference is for a fee simple and that this is so in all cases in which the question has been determined by decision, and that in all except one of the states in which the statutory preference is for a life estate and remainder the rule in *Shelley's Case* obtains, which doubtless accounts in large part for the statutes in those states.

## V.

APPLYING THE FOREGOING PRINCIPLES TO THE FACTS OF THIS CASE, THE ESTATE IN QUESTION MUST BE HELD TO BE A FEE SIMPLE.

1. *The will and codicils overwhelmingly necessitate this conclusion.*

As already shown, this is the case of a direct, express, intentional fee tail in the first takers. If there

were nothing else in the will and codicils bearing on the question, the estate would necessarily, as also already shown and as held by the Supreme Court of Hawaii in this case, have to be held a fee simple in the first takers, since fees tail cannot exist in Hawaii. But there is much else in the will and codicils bearing on this question, and everything emphasizes the inevitability of the same result. So much so, indeed, that even if what is in terms, a direct, express, intentional fee tail would, standing alone, be presumptively a life estate and remainder in a jurisdiction in which a fee tail cannot exist, that presumption would in this case be clearly overcome. This appears both from the devise in question and from other parts of the will and codicil taken as a whole. The will and codicils are drawn with the greatest nicety. They show with unusual clearness and force and in many ways, directly, expressly, by implication and by contrast, both that the devise was intended to be made to the first takers alone and that it was intended to be an estate of inheritance in them. There is not a word in the will or either codicil upon which to base a theory of only a life estate in the first takers or a theory of a present direct devise—an estate by purchase—in the heirs of the body, or a theory of any special benefit to such heirs, any more than would be the case if the devise had been to “K and K and their heirs.” It is unnecessary to repeat here an analysis of the will and codicils. That has been done under Subdivision 4 of Part II of this brief, and we respectfully ask the court to consider that subdivision of this brief as if repeated here.

2. *The Nahaolelua and Boeynaems Cases not only do not militate against but support this conclusion.*

If the court should be of the opinion that the *Nahaolelua* case (and the *Boeynaems* case, which merely followed it) cannot be distinguished from the present case, we submit that it should be overruled. The reasons are so convincing why the estate now in question should be held to be a fee simple, that the decision in that case should not be allowed to stand in the way of doing justice in this case, or in other cases that may arise in the future on wills or deeds of long ago, in reliance upon which vast expenditures have been made in improvements.

That decision is so recent that it cannot be considered as having become a rule of property. The question on the deed there involved has been in practically continuous litigation since it first arose until almost the present time. The decision cannot have been acted upon, not only because of such litigation, but also because of the uniqueness of its facts and the probability that no attempts have been made since then or, indeed, since the *Rooke* decision, or will hereafter be made, to create estates tail, and because, if, as the plaintiff contends, the *Nahaolelua* case is in its facts in point in the present case, then the ground upon which it was decided is set forth so obscurely that no one could act upon it with certainty without further clarification by the court.

The decision of the Federal Supreme Court, of course, would in no wise prevent the Supreme Court of Hawaii from overruling these former decisions of

its own, inasmuch as the Federal Supreme Court did not decide the case on its merits but in effect left the question exclusively to the local court. The court would have affirmed the decision in that case just as readily if the decision had been the other way. And, of course, the facts in the present case are so different from those in that case that that court would not think of saying that they were not materially different. That court even went so far in *Kapiolani Estate v. Atcherly*, 238 U. S. 119, as to hold that, when a material new fact appeared, the Supreme Court of Hawaii should have held differently from a decision rendered by the Federal Supreme Court on an earlier appeal in the same case.

Moreover, when under the circumstances the same local court which decided the *Nahaolelua* and *Boey-naems* cases could find nothing in those cases to prevent it from deciding the present case the way it did, we submit that this court, if it is of the opinion that the present case was correctly decided, should not take the position that it must decide it incorrectly because of anything in those earlier decisions, even if it should find that those decisions in fact if not in theory were inconsistent with the decision in this case.

Assuming, however, that the *Nahaolelua* case was correctly decided, it is easily distinguishable from this case. The two cases, indeed, are so wide apart in their facts with reference to the theory upon which the *Nahaolelua* case was decided, that there is little real resemblance between them, and that case can on that theory be allowed to rest on its own special facts



so far as this case is concerned. And that is the view taken by the Supreme Court of Hawaii in this case. (23 Haw. 747, 757-9; Tr., pp. 53-55.)

It goes without saying that the doctrine of *stare decisis* does not apply except when the very point in issue was in issue in the earlier case and was actually required by the facts to be decided. See especially *Mossman v. Government*, 10 Haw. 421, 429-433; *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 429, 574-5. And nothing could be more dangerous or unscientific than to hold that one case is governed by another merely because of a superficial similarity. The entire system of the common law has been built up on distinctions between the facts of different cases. The very essence and merit of the system is that each case is to be decided on its own facts.

Now, what were the facts in that case? There were two deeds. The first was expressly referred to in the second as one of the matters leading up to the second. For the purposes of construction it was made a part of the second. The court took that view. It set forth at length in the decision all of the material parts of both deeds. It appears that, as set forth by the court, the grantor in the first deed, being then unmarried but about to get married, and in contemplation of marriage and of the possible birth of issue, conveyed the land (a half interest) to two trustees in trust for the grantor herself until the solemnization of the marriage, and after such solemnization to pay the net rents and profits to her free from control during her said intended coverture, and upon further

trust in case of her decease after such solemnization and during the lifetime of said intended husband leaving issue of said intended marriage, to pay and apply the said rents and profits to the support, education and advancement of such issue, and, if only one child, then for such child, during minority, and upon further trust, upon such child or children attaining majority, to convey the land to such child or children in fee simple. What could be more indicative of a general intention to create an interest for life in the first taker and, at least in certain contingencies, a fee simple in the second takers, who, also, were to be the immediate children and not the issue of every degree? What could be more indicative of a special intention to benefit the children directly in certain contingencies by giving them the fee simple after the death of the life tenant or at a little earlier or later date, and, even more than that, to give the children from the time of their respective births the benefit of the property even before the death of the life tenant, The primary and expressed intention was the direct benefit of the children.

The marriage took place. A son was born. The grantor's hopes had been realized to that extent. As an actual mother she wished now to do even more for the children. Hence, the second deed. It recited that the first, the "ante-nuptial deed of trust," had been made, describing it; that since then the marriage had taken place and a son, naming him, had been born, who was then living; and that the mother had also since then acquired the other half interest in the

property by descent from her brother. The deed then proceeds, that therefore and in consideration of the premises, the marriage and the birth of the son then living, and at the request of the mother, the trustees conveyed the entire land to her, and to the heirs of her body, to have and to hold to her, and the heirs of her body forever, in special trust for the use and benefit of her said son, naming him, and such other child or children as may thereafter be born to her, and his or their heirs and assigns forever, as he or they shall arrive at majority. Here, again, as in the first deed, if anything is clear, it is an intention to benefit the immediate children directly by giving them a fee simple interest from the time of their majority, the intention being in a general way apparently to give the use and benefit to the mother until the children came of age and then to the children. Both deeds were somewhat inartificially drawn and failed to provide for all contingencies and the court doubtless felt that it had to make the best of them that it could. All parts of both deeds manifest in the strongest way a general and special intention to benefit the children directly by giving them a fee simple interest in remainder after a life or near-life interest in the mother as first taker. It is true that the court held that one clause, the trust clause, in the second deed was not valid, but that, of course, would not detract from its value or effect as showing the intention. (*Heaseman v. Pease*, L. R., 7 Ch. App. Cas. 275, 283.) And that is the view taken by the Supreme Court of Hawaii in the present case. (23 Haw. 747, 758; Tr., p. 54.)

It also is the view taken by counsel for the plaintiff in the present case, who, in his printed brief in the Federal Supreme Court in the *Boeynaems* case, said:

"But this recital follows a recital of her marriage and the birth of a child, a much more important factor in determining intention, since the deed not only recites this fact as one of the reasons, but recites the marriage and the 'birth of a son now living' as the *consideration for the deed*, and further recites in the habendum clause that the deed is executed '*in special trust for the use and benefit of her said son Edward Nahonoomaui Kia and such other child or children as may hereafter be born to her.*'

\* \* \* \* \*

"These reasons strongly support the construction placed upon the deed by the Hawaiian Court. The children did have an interest under the original deed. The construction claimed by the plaintiff in error would entirely take away any interest which they might have under the later deed to Elizabeth. Moreover, the invalid trust clause and the heading 'Trust Deed' show that the parties did not intend to make an absolute deed in fee simple to Elizabeth, but that it was understood that the children born and unborn, had a present interest in the estate conveyed."

In the *Nahaolelua* case all the provisions of both deeds, outside of the immediate granting and habendum parts, pointed strongly in one direction, that of a life estate and remainder. In the present case, all the provisions of the will and codicils point as strongly in the other direction, that of a fee simple.

Counsel for the plaintiff evidently finds much embarrassment in the position he took in the *Boeynaems* case. Apparently he has concluded that the least



awkward thing to do now is to put on a bold front and take a directly contrary position. Evidently also he is equally embarrassed by the reasoning of the court in the *Nahaolelua* and *Boeynaems* cases. In order to avoid the effect of that reasoning and at the same time to make the decisions in those cases available for the support of his contentions in the present case as against all decisions elsewhere, he would have this court rewrite those decisions to suit his purposes. He now contends that, although the local court, as he then contended it should do, decided those cases on the theory that the estate would be either a fee simple or a life estate and remainder according to which would more nearly approximate the intention, this court should hold that that court erred in adopting that theory and should hold further, not that therefore that court should have come to the opposite conclusion, but that this court should accept the conclusion of that court, although erroneous, as establishing the law in Hawaii, and then hold that that court, in order to come to that conclusion logically, must have held, contrary to its express declaration, that the estate would be a life estate and remainder in every case, and hence that the decision in this case, although correct on principle and authority, should be reversed! In other words, that since, as he contends, the local court reached an erroneous conclusion from erroneous premises, this court, instead of substituting a correct conclusion from correct premises, should allow the incorrect conclusion to stand but substitute other and even more patently incorrect premises in order to sup-

port the incorrect conclusion in a way that will help the plaintiff in the present case.

The decision in this case is clearly correct. If the decisions in those cases are incorrect, they should be overruled. If they are correct, or if, in case they are incorrect, they should be allowed to stand, they are, as the same court which decided them has held in this case, easily distinguishable from this case on the facts so far as the conclusion is concerned, while the reasoning on which the conclusion was based in those cases absolutely necessitates the conclusion reached by the local court in this case. Thus, those cases support the defendant in this case.

## VI.

EVEN IF THE NAMED DEVISEES TOOK ONLY A LIFE ESTATE AND THE HEIRS OF THE BODIES A REMAINDER IN FEE SIMPLE, STILL THE DEFENDANT WOULD BE ENTITLED TO POSSESSION AND THE PLAINTIFF COULD NOT RECOVER AT THIS TIME.

By item 16 of the first codicil (Tr., p. 88), the testatrix empowered all beneficiaries to whom she gave life interests in any lands to make valid leases of them for terms of ten years, the rentals under such leases after the deaths of the life beneficiaries to go to the trustees under the will. The named beneficiaries of the land of Hanohano now in question gave a lease of the whole of that land to Mr. Robinson for a term of fifty years beginning January 1, 1892. (Tr., p.

76.) Consequently, we submit, he and his assignee of a part of the land, the defendant, could in any event hold for a period of ten years after the death, on June 8, 1914, of the survivor of the named beneficiaries even if they were only life tenants.

It is true, the lease was for fifty years and not for ten years. But that, we submit, is immaterial. If the named devisees took life estates, the testatrix could not, if she would, have limited their right to make leases to ten years. That would be an unlawful restraint inconsistent with the devise. They could in any event make leases that would be valid for at least the life estate. The intent was not to limit powers, but to confer additional powers by enabling them to make leases that would be good for a reasonable period after the termination of the life estates. For instance, could not the life tenants make a lease for ten years to begin five or ten or twenty years thereafter, and would it not be valid in case that time of beginning should fall within the life estate? Or, could not they make a lease for ten years to begin the day before the survivor of them died? Or, could they not make several leases of ten years each to take effect successively? Why, then, not make one long lease to be good for the life estate and not exceeding ten years thereafter. If they made a ten-year lease, there would be nothing to prevent its cancellation by mutual agreement before its expiration, if the life tenants seemed to be nearing their ends, and the making of a new similar ten-year lease then. The lease in question, of course, was made in the best of faith and at a great increase in

rental, doubtless due largely to the length of the lease, which would warrant large expenditures in development.

It may be argued *contra*, however, that when Mr. Robinson bought from Mr. Bishop, as he supposed, the fee simple, or on the plaintiff's hypothesis, the life estate, the lease became merged in the estate thus conveyed. True, a lesser estate usually merges in a greater estate, but equity prevents this so as to carry out the intention, or, when no intention is expressed, so as to protect the interests of the person in whom the estates are united. (16 Cyc. 666.) For instance, if the greater estate were set aside, there would not be a merger so as to destroy the lesser estate also. (16 Cyc. 667.) If, as we contend, Mr. Robinson got the fee simple, of course there would be a merger. But, if he got only a life estate, he should not on that account be deprived of his lease. We submit that in Hawaii, where equitable defenses are so freely admitted at law (*Kamohai v. Kahale*, 3 Haw. 530, 532), the rule as to merger would be the same at law as in equity. For instance, equity will, in order to protect the person in whom the estates meet, prevent a merger of an estate for years in a life estate. (16 Cyc. 668.) Likewise, although an estate *pur autre vie* ordinarily would merge in an estate for one's own life, equity will prevent it in order to do justice. (*Id.*) So in Hawaii, at law, where there was an estate to A for life, remainder to B for life, remainder to C in fee, and A sold to B and then outlived B, it was held that A's estate did not merge in B's. (*Atcherly v. Lewers*



& *Cooke*, 18 Haw. 625, 627. See, also, on this subject, *Evans v. Bishop Tr. Co.*, 21 Haw. 74, 82-3; *Godfrey v. Rowland*, 16 Haw. 377, 389.)

We submit, therefore, in conclusion that the judgment of the Supreme Court of Hawaii should be affirmed.

Dated at Honolulu, this 20th day of February, A. D. 1918.

Respectfully submitted,

FREAR, PROSSER, ANDERSON & MARX,

THOMPSON & CATHCART,

FREDERICK W. MILVERTON,

*Attorneys for Defendant.*

## SYNOPSIS OF WILL AND CODICILS OF BERNICE P. BISHOP.

(The parts particularly involved in this case are in  
italics.)

THE WILL.

(Oct. 31, 1883.)

### Items.

1. \$200 each to seven young women namesakes: E. Bernice Bishop Dunham, Bernice Parke, Bernice Bishop Barnard, Bernice Bates, Anne Pauahi Cleghorn, Lilah Bernice Wodehouse and Pauahi Judd.
2. \$200 each to four special women friends: Mrs. William F. Allen, Mrs. Amoe Haalalea, Mrs. Antone Rosa and Mrs. Nancy Ellis.

## Items.

3. \$500 each to four apparently needy women friends: Mrs. Caroline Bush, Mrs. Sarah Parmenter, Mrs. Keomailani Taylor, free from the control of their husbands, and Mrs. Emma Barnard.
4. Two lands to H. R. H. Liliuokalani, wife of Gov. John O. Dominis, "to have and to hold for and during the term of her natural life, and after her decease to my trustees upon the trusts below expressed."
5. *"I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of Thirty Dollars (\$30.) per month, (not \$30. each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed."*
6. \$40 to Mrs. Kapoli Kamakau "per month during her life" and \$30 each to servant woman Kaia and to Nakaahiki (w) similarly for life.
7. A house lot to Kapaa (k), "to have and to hold for and during the term of his natural life; upon his decease to my trustees."
8. A house lot to Aukea (w), wife of Lokana (k), "to have and to hold for and during the term of her natural life; upon her decease to my trustees."

## Items.

9. Numerous lands, including Molokai ranch and the live stock and personal property thereon, to her husband, Charles R. Bishop; "to have and to hold together with all tenements, hereditaments, rights, privileges and appurtenances to the same appertaining, for and during the term of his natural life; and upon his decease to my trustees."
10. Certain premises to her Majesty Emma Kaleleonalani, Queen Dowager; "to have and to hold with the appurtenances for and during the term of her natural life; and upon her decease to my trustees."
11. \$5000 for repairs or improvements upon Kawaiahao Church.
12. \$5000 for additions to Kawaiahao Family School for Girls.
13. "All of the rest, residue and remainder of my estate, real and personal, wherever situated, unto the trustees below named, their heirs and assigns forever" in trust for the Kamehameha Schools.
14. Appoints trustees.
15. A fish pond also (in addition to devise in item 10) to said Emma Kaleleonalani, Queen Dowager, "for and during the term of her natural life; and after her decease to my trustees."
16. "All of my personal property of every description, including cattle at Molokai" (in addition to devise in item 9) to her husband, Charles

## Items.

R. Bishop; "to have and to hold to him, his executors, administrators and assigns forever."

## 17. Appoints executors.

## FIRST CODICIL.

(Oct. 4, 1884.)

1. \$1000 to Mrs. W. F. Allen (in lieu of the \$200 given by item 2 of the will).
2. Other premises to Queen Emma (in lieu of those given by item 10 of the will); "to have and to hold for and during the term of her natural life; and upon her decease to my trustees."
3. Various additional lands to her husband, Charles R. Bishop; "to hold for his life, remainder to my trustees."
4. Piece of land to Kuaiwa (k) and Kaakaole (w), "old retainers of my parents"; "to have and to hold for and during the term of their natural lives and that of the survivor of them; remainder to my trustees."
5. Certain premises to Kaluna (k) and Hoopii, his wife; "to have and to hold for and during the terms of their natural lives and that of the survivor of them; remainder to my trustees."
6. An acre lot to Naiapaakai (k) and Loika Kahua, his wife, "to have and to hold for and during the term of their natural lives, and that of the survivor of them; remainder to my trustees."
7. \$300 per year during minority, then \$1000 lump,



## Items.

- to Lola Kahailiopua Bush, free from the control of her husband.
8. Same to Bernice B. Barnard (in lieu of \$200 under item 1 of Will) free from the control of her husband.
  9. Land (Moanalua) and fishery to "my friend" Samuel M. Damon; "to have and to hold with the appurtenances to him, his heirs and assigns forever."
  10. \$20 per month each to "my servants" Kaleleku (k) and Kaoliko, his brother, "during the term of the natural life of each of them."
  11. *"I revoke so much of the fifth article of my said will as devises the land known as "Mauna Kamala" to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."*
  12. \$2000 each to Iolani College, St. Alban's Priory and St. Andrews Church.
  13. Land and spring to Kaiulani Cleghorn, daughter of A. S. Cleghorn, "to have and to hold for and during the term of her natural life; remainder to my trustees."
  14. \$500 to Rev. Henry H. Parker.

## Items.

15. \$200 to Mary B. Collins, \$100 to Maggie Wynn, in each case "if she be with me at the time of my death."
16. *"I hereby give the power to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of the said devisees, the rent however, after such decease to be paid to my executors, or trustees; provided, however, that no rent be collected for a longer period in advance at any one time than for six months, and no bonus be taken by said devisees or any of them, on account of such leases or lease; in either of which cases such lease or leases shall cease and determine, at the option of my executors or trustees, upon the death of such devisee or devisees, who shall have collected rent for a longer period in advance than for six months or who shall have taken such bonus."*
17. Powers of trustees.

## SECOND CODICIL.

(Oct. 9, 1884.)

1. Land and fishery (in addition to devise in item 4 of will) to H. R. H. Liliuokalani, wife of

## Items.

- John O. Dominis; "to have and to hold for and during the term of her natural life, remainder to my trustees."
2. Land (in addition to house lot under item 7 of will) to Kapaa (k), he to pay taxes thereon and upon the lot devised to Aukea; "to have and to hold for and during the term of the natural life of him said Kapaa, remainder to my trustees."
  3. A house lot to Aukea (w), wife of Lokana (in lieu of house lot devised by item 8 of will); "to have and to hold for and during the term of the natural life of her, said Aukea, free from the control of her husband; remainder to my trustees."
  4. Directions in regard to Kamehameha Schools.

## SUMMARY OF WILL AND CODICILS.

	<i>Will.</i> Items.	<i>1st Cod.</i> Items.	<i>2d Cod.</i> Items.
1. Lump sum to 18 persons.....	1, 2, 3	14, 15	
One lump sum substituted for another .....		1	
2. Lump sums to 5 schools and churches .....	11, 12	12	
3. Annuities during minority, then lump sums, to 2 persons..... (One of these in substitution for lump sum under 1 above.)		7, 8	
4. Annuities to 3 persons for life..	6		
5. Annuity to each of two brothers for life of each.....		10	
6. Annuity to both and survivor so long as either lives (husband and wife) .....	5		

## Items.

7. Personal property to one and executors, administrators and assigns .....	16		
8. Land to 7 persons for life, remainder to trustees ...4, 7, 8, 9, 10, 15			
Other lands substituted in 2 cases		2	3
Other lands added in 3 cases....		3	1, 2
9. Lands to 3 sets of 2 persons each for lives and that of survivor; remainder over .....		4, 5, 6	
(In 2 cases expressed to be husband and wife.)			
10. <i>Land to 2 persons and heirs of body of either (husband and wife) .....</i>	5		
<i>Other land is substituted to same 2 persons, to hold as above limited</i>			11
11. Lands to one person, his heirs and assigns .....		9	
12. Land and personalty (residue) to trustees, their heirs and assigns	13		
13. Directions to trustees .....			4
14. Powers of life tenants to lease for 10 years .....		16	
15. Appoints trustees .....	14		
16. Appoints executors .....	17		



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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THE AMERICAN STEAMSHIP "COLUSA," Her  
Boilers, Engines, Tackle, Apparel and Other  
Furniture, and GRACE STEAMSHIP COM-  
PANY, a Corporation,

Appellants,

vs.

GEORGE I. DUNWOODY,

Appellee.

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**Apostles on Appeal.**

---

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

---

**Filed**

SEP 2 1907

**F. D. Monckton,**  
Clerk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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THE AMERICAN STEAMSHIP "COLUSA," Her  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Answer.....	21
Answer of Grace Steamship Company.....	14
Certificate of Clerk U. S. District Court to Apostles on Appeal.....	144
Certificate of United States Commissioner....	97
Claim of Grace Steamship Co.....	13
DEPOSITIONS ON BEHALF OF LIBELANT:	
HUGO, DALLMAN.....	71
Cross-examination..	81
Redirect Examination.....	95
Recross-examination....	96
PFAUTSCH, CARL.....	56
Cross-examination..	60
Redirect Examination.....	65
Recross-examination....	66
Redirect Examination.....	67
DEPOSITIONS ON BEHALF OF LIBELEES:	
BERGSTEN, JOHN.....	25
Cross-examination..	39
Redirect Examination.....	52
Final Decree.....	141
Libel for Damages for Personal Injuries: \$5,000	7
Minutes of Court, March 16, 1917—Hearing...	137
Notice of Appeal.....	144

Index.	Page
Opinion and Order for Entry of Decree in Favor of Libelant .....	139
'Order Extending Time to File Apostles on Ap- peal and Docket Cause to and Including September 1, 1917.....	148
Praecipe for Apostles on Appeal.....	1
Statement of Clerk, U. S. District Court Under Admiralty Rule 4.....	2
Stipulation and Order Extending Time to File Apostles on Appeal and Docket Cause to and Including August 1, 1917.....	146
Testimony Taken in Open Court.....	99
TESTIMONY ON BEHALF OF LIBELANT:	
DUNWOODY, GEORGE L.....	105
Cross-examination .....	114
Recalled .....	134
WILLIAMS, L. L.....	99
Cross-examination .....	103
TESTIMONY ON BEHALF OF RE- SPONDENT:	
CRIBBIN, J.....	121
Cross-examination .....	124
STREMMEL, HARRY .....	126
Cross-examination .....	130
Redirect Examination .....	132

*In the Southern Division of the United States District Court, for the Northern District of California, First Division.*

IN ADMIRALTY —No. 16,129.

GEORGE I. DUNWOODY,

Libelant and Appellee,

vs.

The American Steamship "COLUSA" etc., (Grace Steamship Company, Claimant), and GRACE STEAMSHIP COMPANY, a Corporation,  
Libelees and Appellants.

**Praeceptum for Apostles on Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in this court, and include in said transcript the following pleadings, proceedings and papers on file herein, to wit:

1. All those papers required by Section 1 of Paragraph 1 of Rule IV of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

2. All the pleadings in said cause and the exhibits annexed thereto.

3. All the testimony and other proofs adduced in said cause, including the testimony taken at the trial; all depositions taken by either party and admitted in evidence, and all exhibits introduced by

either party. Said exhibits to be sent up as original exhibits.

4. The opinion and decision of the court. [1\*]
5. The final decree and notice of appeal.
6. The assignment of errors.

GOODFELLOW, EELLS, MOORE AND  
ORRICK,

Proctors for Libelees and Appellants.

Service of a copy of the within is hereby acknowledged this 11th day of June, A. D. 1917.

F. R. WALL,  
Proctor for Libelant.

[Endorsed]: Filed Jun. 11, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

**Statement of Clerk, U. S. District Court Under  
Admiralty Rule 4.**

No. 16,129.

GEORGE I. DUNWOODY,

Libelant,

vs.

The American Steamship "COLUSA," Her Boilers,  
Engines, Tackle, Apparel, and Other Fur-  
niture,

and

GRACE STEAMSHIP COMPANY, a Corpora-  
tion,

Respondent.

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\*Page-number appearing at foot of page of original certified Apostles  
on Appeal.



PARTIES.

Libelant:

GEORGE I. DUNWOODY.

Respondents:

The American Steamship "COLUSA," etc.,  
and GRACE STEAMSHIP COMPANY,  
a Corporation.

Claimant:

GRACE STEAMSHIP COMPANY, a Corporation.

PROCTORS.

For Libelant:

F. R. WALL, Esquire, San Francisco, California.

For Respondents and Claimant:

GOODFELLOW, EELLS, MOORE & OR-  
RICK, San Francisco, California. [3]

PROCEEDINGS.

1916.

December 16. Filed verified Libel, for damages,  
for personal injuries, in the sum of  
\$5000.00, interest and costs.

Issued Monition for attachment of  
the Steamship "COLUSA," which  
said Monition was afterwards, on  
the 18th day of December, 1916, re-  
turned and filed, with the follow-  
ing Return of the United States  
Marshal endorsed thereon: "In  
obedience to the within Monition,  
I attached the Am. S. S. "Colusa"

therein described, on the 16th day of December, 1916, at Pier 26, San Francisco, Cal., and have given due notice to all persons claiming the same that this Court will, on the 26th day of December, 1916 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein-named Am. S. S. "Colusa," and at the same time, handed to and left a copy of the within Monition with Clifton Curtis, Master of the S. S. "Colusa" whom I found in charge.

J. B. HOLOHAN,

United States Marshal.

By Lawrence J. Conlon,

Office Deputy."

San Francisco, Cal. Dec. 16th, 1916. [4]

1916.

December 16. Issued Citation for appearance of Respondent (Grace Steamship Company), which Citation was afterwards, on the 18th day of December, 1916, returned and filed with the following Return of the United States Marshal endorsed

thereon: "I have served this writ personally, by copy on the Grace Steamship Company, by handing to and leaving a true and correct copy thereof with G. H. Carter, Sub-manager of the Grace Steamship Company, personally at San Francisco, California, on this 16th day of December, A. D. 1916."

J. B. HOLOHAN,  
U. S. Marshal.

By Lawrence J. Conlon,  
Office Deputy Marshal."

Filed Claim of Grace Steamship Company, a Corporation, to American Steamship "Colusa."

Filed Admiralty Stipulation, for the release of the Steamship "Colusa," in the sum of \$4000.00, with Maryland Casualty Company as surety.

1917.

January 22. Filed Answer of Respondent.

March 14. Filed Amendment to Answer of Respondent.

16. The above-entitled cause this day came on for hearing in the District Court of the United States, for the Northern District of California, at the City and County of San Francisco, before the Honorable, Maurice T. Dooling, Judge; and after hearing duly had, was submitted to the Court for decision. [5]

6      *The American Steamship "Colusa" et al.*

March      16. Filed deposition of John Bergsten, a witness produced on behalf of Respondent, taken before Charles R. Holton, a Notary Public, at San Francisco, Calif.

Filed deposition of Carl Pfautsch, a witness produced on behalf of Libelant, taken before Thomas E. Hayden, U. S. Commissioner, at San Francisco, California.

Filed deposition of Hugo Dallman, a witness produced on behalf of Libelant, taken before Thomas E. Hayden, U. S. Commissioner, at San Francisco, California.

May          14. The Court this day rendered a written opinion, in which it was ordered that a decree be entered in favor of the libelant, in the sum of \$1500.00 and costs.

22. Filed Final Decree.

June          6. Filed Notice of Appeal.

Filed Bond on Appeal in the aggregate sum of \$3250.00, with United States Fidelity & Guaranty Company, as surety.

July          23. Filed Assignment of Errors. [6]



*In the United States District Court, in and for the  
Southern Division of the Northern District of  
California, First Division.*

IN ADMIRALTY—No. 16,129.

GEO. I. DUNWOODY,

Libellant,

vs.

The Am. Steamship "COLUSA," etc., and GRACE  
STEAMSHIP COMPANY, a Corporation,  
Libelees.

**Libel for Damages for Personal Injuries: \$5,000.**

To the Honorable M. T. DOOLING, Judge of the  
United States District Court, in and for the  
Southern Division of the Northern District of  
California, First Division, In Admiralty:

The libel of George I. Dunwoody, late a seaman on  
the steamship "Colusa," a vessel of the merchant  
marine of the United States against said steamship  
"Colusa," her boilers, engines, tackle, apparel and  
other furniture, and against all persons claiming any  
interest therein, in a cause of damages for personal  
injuries to enforce the laws made and existing for  
the health and safety of seamen, civil and maritime,  
alleges as follows:

**CAUSE OF LIBEL AGAINST SAID "COLUSA."**

1. That certain steamship or vessel known as and  
called the "Colusa" is, and was at all of the times  
hereinafter mentioned, a vessel of the merchant  
marine of the United States; that said vessel is now  
in the port of San Francisco, in the state of Cali-

partially disabled from following any occupation requiring manual labor. That by reason of the premises libelant has been damaged in the sum of \$5,000, which amount he asks this court to award to him.

6. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

### CAUSE OF LIBEL AGAINST GRACE STEAMSHIP CO.

The libel of George I. Dunwoody, late a seaman on the steamship "Colusa," against Grace Steamship Company, a Corporation, and a shipowner, in a cause of damages for personal injuries to enforce the laws made and existing for the health and safety of seamen, civil and maritime, alleges as follows: [9]

1. Libelant hereby refers to and makes a part of this his libel *in personam* all of the articles numbered "1," "2," "3," and "4," in the foregoing libel *in rem* as if the allegations of each of said articles were here particularly set out at length and in detail.

2. That, as libelant is informed and believes and therefore alleges the truth to be:

At all of the times herein mentioned and referred to said libelee Grace Steamship Company was, ever since has been, and still is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at the city of New York, in the State of New York; that at all of said times said libelee was the owner of and operated the steamship "Colusa," the vessel herein referred to; that at all of said times this libelant George I. Dunwoody was in the service and

employ as a seaman of said Grace Steamship Company, a Corporation.

3. That, further, said injuries were also caused by the negligence of the boatswain of said vessel in using and in causing and in ordering to be used said forelock or pin; and, further, said injuries were also caused by the negligence of the mate of said vessel in not covering or causing to be covered the opening of said number one hatch of said vessel; that at all of said times said libelant was under the authority of said boatswain and of said mate, and that at all of said times said boatswain and said mate were seamen having command of and authority over said libelant.

4. Libelant hereby refers to and makes articles numbered "5" and "6" of the foregoing cause of libel *in rem* a part of this his cause of libel *in personam* in the same manner as if all of the allegations of each of said articles were here set out at length and in full. [10]

WHEREFORE, libelant prays that process in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against said steamship "Colusa," her boilers, engines, tackle, apparel and other furniture and that all persons claiming any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid; and that due process may also issue against libelee Grace Steamship Company, a Corporation; and that said company be cited to appear and answer on oath all and singular the matters aforesaid, and if said libelee cannot be found, then that its goods and

chattels may be attached to the amount sued for with interest and costs, and if goods and chattels belonging to it cannot be found, then that its credits and effects in the hands of W. R. Grace & Company, a Corporation, may be attached in the hands of said W. R. Grace & Company, a Corporation, garnishee, and that said garnishee be summoned to appear and answer on oath as to the credits and effects in its hands belonging to said libelee Grace Steamship Company, a Corporation; and that this Court will decree the payment by said libelee Grace Steamship Company, a Corporation, to this libelant of the aforesaid sum of \$5,000 and interest and costs; and that said steamship "Colusa," her boilers, engines, tackle, apparel and other furniture, be condemned and sold to pay said \$5,000 and interest and costs; and that libelant may have such other and further relief as he may be entitled to receive.

F. R. WALL,

Proctor for Libelant.

GEORGE I. DUNWOODY,

Libelant.

Subscribed and sworn to before me this 16th day of December, 1916.

[Seal]

C. W. CALBREATH,

Deputy Clerk United States District Court in and for the Southern Division of the Northern District of California.

[Endorsed]: Filed Dec. 16, 1916. W. B. Maling. Clerk. By C. W. Calbreath, Deputy Clerk. [11]



*In the District Court of the United States of  
America, Northern District of California.*

IN ADMIRALTY—No. 16,129.

GEORGE I. DUNWOODY,

Libellant,

vs.

The Am. Steamship "COLUSA," etc., and GRACE  
STEAMSHIP COMPANY, a Corporation,

**(Claim of Grace Steamship Co.)**

To the Honorable Judges of the District Court of the  
United States for the Northern District of Cali-  
fornia:

The Claim of Grace Steamship Co. to the Am.  
Steamship "Colusa," her tackle, apparel and furni-  
ture, now in the custody of the Marshal of the United  
States for the Northern District of California, at  
the suit of George I. Dunwoody alleges—

That Grace Steamship Co. is the true and *bona  
fide* owners of the said Am. S. S. "Colusa," her tackle,  
apparel and furniture. and that no other person is  
owner thereof.

Wherefore, the claimant pray—that this Honor-  
able Court will be pleased to decree a restriction of  
the same to Grace Steamship Co. and otherwise right  
and justice to administer in the premises.

GRACE STEAMSHIP CO.,  
E. J. EYRE, Auditor.

Northern District of California,—ss.

GRACE STEAMSHIP CO.,  
E. J. EYRE, Auditor.

1. Admits that the allegations of paragraph 1 of said libel are true.

2. Admits that the allegations of paragraph 2 of said libel are true.

3. Denies that on the 24th day of September, 1916, or at any other time, or at all, that the libelant without fault on his part received any injuries whatever. Denies while the libelant was engaged in setting up a turnbuckle in order to fasten the lashings or fastenings of said deckload of said vessel, the forelock or pin that secured or held in place the link over the pelican hook of said turnbuckle slipped out or that thereby [13] libelant was thrown off said deckload through the open hatch of number one hatch of said vessel, or any hatch, or at all. Denies that libelant from any cause whatever, or at all, fell a distance of 17 feet, or any distance, over and above 4 feet, or that in falling struck with great force or violence upon the boxes under the opening of said hatch, or was by so striking injured.

4. Denies that the injuries referred to in said libel were caused in any manner whatever, or at all, by the unseaworthiness of said vessel, or by any unseaworthiness of said vessel, or by the failure or neglect, or any failure or neglect of her owners, or any person, to supply or keep in order the appliances appurtenant to said vessel, and in this behalf avers that said steamship "Colusa" was at all times entirely seaworthy and that all the appliances thereon were at all times kept in perfect order. Denies that the said forelock or pin was a sixpenny nail and denies that the pin or forelock referred to in said libel was at all or in any manner unsuitable or at all or in any manner unfit for the purposes for which it was

used, as referred to in said libel, and denies that the same was liable at any time or at all to fall or work out or was particularly or at all liable to fall out because it was too small or too loose for the purposes for which it was used, and denies that it was too small or too loose for the purposes for which it was used.

5. Alleges that it has not sufficient information or belief to enable it to answer the allegation of said libel that "libelant has suffered great physical and mental pain and anguish, and has been totally unfitted from following his occupation as a seaman, or any occupation whatsoever since said 24th day of September, 1916, and will continue to be so unfitted for sometime to come, but for how long he does not know; that libelant may be permanently partially [14] disabled from following any occupation requiring manual labor"; and basing its denial thereof on that ground, denies said allegation and requires proof of the same.

Denies that by reason of any of the matter set forth in the libel herein, or by reason of any facts or circumstances related therein or at all libelant has been damaged by said alleged injuries in the sum of five thousand (5,000) dollars, or in any other sum whatsoever, or at all.

And for a further and separate answer and defense to said libel, respondent alleges that any injury or injuries suffered by libelant were not caused by any unseaworthiness of said steamship "Colusa," or by reason of any improper or unsuitable or unfit appliances on said steamship, but that the said injuries were caused by libelant's own carelessness and negli-



gence in failing to properly adjust the said turnbuckle fastening the said deck lashings and in carelessly and negligently screwing up or tightening the said improperly adjusted turnbuckle, and by libelant's own carelessness and negligence in the manner in which he tightened up the said deck lashing apparatus. That all and singular the premises are true.-

WHEREFORE, respondent prays that this Honorable Court will pronounce against the demand of the libelant in this libel above mentioned with costs.

GOODFELLOW, EELLS, MOORE & ORRICK,

Proctors for Respondents.

The answer of Grace Steamship Company, a corporation, respondent herein, to the alleged cause of libel of George I. Dunwoody, libelant, alleges, denies and admits as follows:

1. Admits the allegations in paragraph 1 of said libel are true. [15]

2. Admits the allegations in paragraph 2 of said libel are true.

3. Denies that on the 24th day of September, 1916, or at any other time, or at all, that the libelant without fault on his part received any injuries whatever. Denies while the libelant was engaged in setting up a turnbuckle in order to fasten the lashings or fastenings of said deckload of said vessel, the forelock or pin that secured or held in place the link over the pelican hook of said turnbuckle slipped out or that thereby libelant was thrown off said deckload through the open hatch of number one hatch of said vessel, or any hatch, or at all. Denies that libelant from any cause whatever, or at all, fell a distance of

17 feet, or any distance, over and above 4 feet, or that in falling, struck with great force or violence upon the boxes under the opening of said hatch, or was by so striking injured.

4. Denies that the injuries referred to in said libel were caused in any manner whatever, or at all, by the unseaworthiness of said vessel, or by any unseaworthiness of said vessel, or by the failure or neglect, or any failure or neglect of her owners, or any person, to supply or keep in order the appliances appurtenant to said vessel, and in this behalf the respondent avers that said steamship "Colusa" was at all times entirely seaworthy, and that all the appliances thereon were at all times kept in perfect order. Denies that the pin or forelock referred to in said libel was a sixpenny nail or was at all or in any manner unsuitable or at all or in any manner unfit for the purposes for which it was used, as referred to in said libel, and denies that the same was liable at any time or at all to fall out or work out or was particularly or at all liable to fall out because it was too small or [16] to loose for the purposes for which it was used, and denies that it was too small or too loose for the purposes for which it was used.

5. Admits that the allegations of paragraph 2 of the libel against this respondent are true.

6. Denies that the injuries referred to in said libel were also or at all or in any manner caused by the or any negligence of the boatswain of said vessel in using or in causing or in ordering to be used said forelock or pin, and denies that the said boatswain or any boatswain or any person whatever other than

the libelant himself ordered or caused to be used the said forelock or pin, and denies that said injuries were also caused or at all caused by the or any negligence of the mate of said vessel in not covering or causing to be covered the opening of said number one hatch of said vessel.

7. Alleges that it has not sufficient information or belief to enable it to answer the allegation of said libel that "libelant has suffered great physical and mental pain and anguish, and has been totally unfitted from following his occupation as a seaman, or any occupation whatsoever since said 24th day of September, 1916, and will continue to be so unfitted for sometime to come, but for how long he does not know; that libelant may be permanently partially disabled from following any occupation requiring manuel labor"; and basing its denial thereof on that ground, denies said allegation and requires proof of the same.

Denies that by reason of any of the matters set forth in the libel herein, or by reason of any facts or circumstances related therein or at all libelant has been damaged by said alleged [17] injuries in the sum of five thousand (5,000) dollars. or in any other sum whatsoever, or at all.

And for a further and separate answer and defense to said libel, respondent alleges that any injury or injuries suffered by libelant were not caused by any unseaworthiness of said steamship "Colusa," or by reason of any improper or unsuitable or unfit appliances on said steamship, but that the said injuries were caused by libelant's own carelessness and

negligence in failing to properly adjust the said turnbuckle fastening the said deck lashings and in carelessly and negligently screwing up or tightening the said improperly adjusted turnbuckle, and by libelant's own carelessness and negligence in the manner in which he tightened up the said deck lashing apparatus. That all and singular the premises are true.

WHEREFORE, respondent prays that this Honorable Court will pronounce against the demand of the libelant in this libel above mentioned with costs.

GOODFELLOW, EELLS, MOORE & ORRICK,  
Proctors for Respondent. [18]

E. T. Ford, being duly sworn, deposes and says: That he is an agent of Grace Steamship Company, a corporation, owner of the American Steamship "Colusa" and respondent herein; that there are no officers of the said corporation now in the city and county of San Francisco, and for this reason he makes this verification for and on behalf of said corporation; that as such agent he is informed of the facts of this matter and has read the foregoing answer and knows the contents thereof, and that the said answer is true to the best of his knowledge, information and belief.

E. T. FORD.

Subscribed and sworn to before me, this 22d day  
of January, 1917.

[Seal]

[Seal] MARY L. THOMAS,  
Notary Public in and for the City and County of  
San Francisco, State of California.



Service of a copy of the within is hereby acknowledged this 22d day of January A. D. 1917.

F. R. WALL,  
Proctor for Libelant.

[Endorsed]: Filed Jan. 22, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [19]

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*In the United States District Court, in and for the  
Southern Division of the Northern District of  
California, First Division.*

IN ADMIRALTY—No. 16,129.

GEORGE I. DUNWOODY,

Libelant,

vs.

The Am. Steamship "COLUSA," etc., and GRACE  
STEAMSHIP COMPANY, a Corporation,  
Libelees.

**Amendment to Answer.**

Now comes Grace Steamship Company, a corporation, owner of the American Steamship "Colusa." and files as of course this amendment to its answer herein, and for a further and separate answer to the libel against said "Colusa," alleges as follows:

For a further and separate answer and defense to said libel, claimant alleges that said libelant was careless and negligent in and about the alleged matters in said libel referred to, which carelessness and negligence proximately concurred with the alleged negligence and carelessness of respondent and proximately contributed to the alleged injury and damage suffered by libelant. That said alleged carelessness

and negligence on the part of said libelant consisted in this, to wit: That said libelant was careless and negligent in adjusting the turnbuckle referred to in the libel herein. That libelant carelessly and negligently failed and neglected to properly or at all fasten the pin which prevented the link from slipping off the pelican hook of said turnbuckle, and negligently and carelessly failed to observe whether the appliances mentioned in said libel were properly or at all secured or adjusted. [20]

For a further and separate answer and defense to said libel claimant alleges that the said alleged injury and damage to said libelant was proximately caused by and proximately resulted from an ordinary risk of the employment of said libelant. That said libelant was fully aware of the said risk and danger connected with his said employment.

For a further and separate answer and defense to said libel, claimant alleges that the said alleged injury and damage to libelant was proximately caused by and through the carelessness and negligence of the fellow servants of said libelant other than the seamen in command.

WHEREFORE, claimant prays that this Honorable Court will pronounce against the demand of the libelant in this libel above mentioned with costs.

For a further and separate answer to the suit against said Grace Steamship Company, respondent alleges as follows:

For a further and separate answer and defense to said suit, respondent alleges that said libelant was careless and negligent in and about the alleged mat-

ters in said libel referred to, which carelessness and negligence proximately concurred with the alleged injury and damage suffered by libelant. That said carelessness and negligence on the part of said libelant consisted in this, to wit: That said libelant was careless and negligent in adjusting the turnbuckle referred to in the libel herein. That libelant carelessly and negligently failed and neglected to properly or at all fasten the pin which prevented the link from slipping off the pelican hook of said turnbuckle, and negligently and carelessly failed to observe whether the appliances mentioned in said libel were properly or at all secured or adjusted.

For a further and separate answer and defense to said [21] suit respondent alleges that the said alleged injury and damage to said libelant was proximately caused by and proximately resulted from an ordinary risk of the employment of said libelant. That said libelant was fully aware of the said risk and danger connected with his said employment.

For a further and separate answer and defense to said suit, respondent alleges that the said alleged injury and damage to libelant was proximately caused by and through the carelessness and negligence of the fellow-servants of said libelant other than the seamen in command.

WHEREFORE, respondents pray that this Honorable Court will pronounce against the demand of the libelant in this suit above mentioned with costs.

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Proctors for Respondents.

W. Upward, being duly sworn, deposes and says: That he is an agent of Grace Steamship Company, a corporation, owner of the American Steamship "Colusa" and respondent herein; that there are no officers of the said corporation now in the city and county of San Francisco, and for this reason he makes this verification for and on behalf of said corporation; that as such agent he is informed of the facts of this matter and has read the foregoing answer and knows the contents thereof, and that the said answer is true to the best of his knowledge, information and belief.

W. UPWARD.

Subscribed and sworn to before me this 13th day of March, 1917.

[Seal]

M. V. COLLINS,  
Notary Public in and for the City and County of  
San Francisco, State of California. [22]

[Endorsed]: Filed Mar. 14, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [23]

*In the United States District Court, in and for the  
Southern Division of the Northern District of  
California, First Division.*

IN ADMIRALTY.

GEORGE I. DUNWOODY,

Libellant,

vs.

The Am. Steamship "COLUSA," etc., and GRACE  
STEAMSHIP COMPANY (a Corporation),  
Libellees.



BE IT REMEMBERED that, pursuant to the stipulation hereinafter set forth and, to wit: on Friday the 29th day of December, 1916, at the hour of 2 o'clock P. M., of said day, in the office of Goodfellow, Eells, Orrick & Moore located in the Insurance Exchange Building, San Francisco, California, before me, Charles R. Holton, a Notary Public in and for the city and county of San Francisco, personally appeared John Bergsten, a witness produced on behalf of the libellees in the above-entitled action, now pending in said court, who, being, by me, first duly sworn was then and there examined and interrogated by R. W. Palmer, Esq., of the firm of Messrs. Goodfellow, Eells, Orrick & Moore, attorneys for said libelees and by F. R. Wall, Esq., attorney for said libelant, whereupon said witness testified as follows, to wit: [24]

**Deposition of John Bergsten, for Libelees.**

JOHN BERGSTEN, a witness called on behalf of the libellee, being first duly sworn testified as follows:

Mr. WALL.—It is hereby stipulated by the parties to the above-entitled libel that the testimony of John Bergsten, a witness produced on behalf of the libellee, may be taken at this time and place without any other or further notice, notice being hereby waived, by Charles R. Holton, who is a notary public and stenographer, and the same may be thereafter transcribed by him and used upon any trial of the cause, either in the above-entitled Court, or on appeal by any of the parties hereto; and further that all objections to the testimony are hereby waived, except

(Deposition of John Bergsten.)

as to the form of the questions, which objections must be made at this time.

Mr. PALMER.—(To the witness.) Q. Your name is John Bergsten?    A. Yes, sir.

Q. What is your occupation?

A. I was chief officer of the "Colusa."

Q. Then you are a seafaring man?

A. I am a past master mariner, steam and sailing.

Q. How long have you been a past master mariner?    A. For the past fifteen years.

Q. For how many years have you been following this business?

A. I was born and raised on the sea, and I have followed it since I was eleven years old. I am thirty-six years old now,—that makes twenty-five years.

Q. On or about September 24th, 1916, with what ship company were you connected?

A. Grace & Co.,—steamship "Colusa."

Q. What position did you hold on that ship?

A. Chief officer.

Q. Do you remember the time when Mr. Dunwoody was injured?    A. Yes, sir. [25]

Q. Was that on or about September 24th, 1916?

A. Yes, sir; September 24th, 1916.

Q. Was he injured on the steamship "Colusa"?

A. Yes, sir; down in Peru at a place they call Paita.

Q. Where was the ship with reference to this port of Paita at the time of the accident?

A. She was in the harbor, heaving up the anchor

(Deposition of John Bergsten.)

and proceeding to sea.

Q. About how long after you weighed anchor did this accident happen?

A. Probably we hadn't finished heaving anchor when this accident happened.

Q. Where was Mr. Dunwoody working at the time that he was injured?

A. He was in No. 1 hatch, under my especial directions, setting up deck lashings.

Q. Will you explain what is the purpose of these deck lashings?

A. These deck lashings is what we carry for to secure our deckload of lumber, or any other cargo which we carry on deck. At the time when this accident occurred we had about nine feet of deckload on the "Colusa," which had to be secured before we went to sea.

Q. Your deckload was of lumber at that time, was it?

A. Yes, sir.

Q. Will you relate just as you remember it how the accident to Mr. Dunwoody occurred,—what was he doing and what you did,—just everything that happened there?

A. I told Mr. Dunwoody to set up the deck lashings across No. 1 hatch. He took them on the starboard side, and I took them on the port side myself, hauling up the chains. The chains had to meet on top of No. 1 hatch for to put on the turnbuckle, to [26] secure the chain lashings tight.

Q. Just explain the deck lashing, how it is

(Deposition of John Bergsten.)

fastened, and what it consists of.

A. There are two chains that meet with a turnbuckle which consists of two screws and two iron bolts; one side is shackled into the chain and the other side is fastened with a kind of slip hook that is hooked into the chain, while we settle up the chains and take the weight off the deckload. In this hook there is a hole made to put in a nail or iron bolt. We generally used, on the "Colusa" a threepenny nail to hold this hook in place, which work Dunwoody was doing under my order at the time the accident happened.

Q. Then, as I understand it, these two chains are fastened on the side of the ship, and they meet in the middle with this turnbuckle that you have explained.

A. Yes, they are shackled fast to the deck.

Q. Explain what you mean by setting up the deck lashings.

A. By setting up the deck lashings,—it is like this—there are two chains coming together in the middle,—one end we generally shackle with a turnbuckle in the chain and the other end we hook it on with this slip hook, and then we just screw them up, taking the weight of the lumber by forcing the lumber into the middle of the ship.

(Note: At this time the libelant entered the room and took his seat beside his proctor.)

Mr. PALMER.—Q. Then, as I understand it, Mr. Bergsten, the purpose of this apparatus is to draw



(Deposition of John Bergsten.)

the chains together and tighten them.

A. Yes, that is the purpose of them.

Q. You can proceed now and tell just what happened on this date, September 24th, 1916. [27]

A. Dunwoody was setting up this chain lashing, under my directions there,—I was standing on the chain on the port side, and he was behind me about fifteen feet; he was using—he had to use, to get the power to set this turnbuckle,—he had to use a key wrench, or pipe wrench, as we call it, about thirty-six inches long, to get the weight off the deckload; he was occupied in setting it up, and I was standing on the chain on the port side to feel the weight of it. All of a sudden I felt the chain give away from under me, and I looked back and Dunwoody had disappeared. He fell over backwards and I found him on top of the hatch combing and cargo.

Q. Who, besides yourself and Mr. Dunwoody, and if anybody, had anything to do with the fastening of this particular deck lashing on No. 1 hatch?

A. Nobody.

Q. Then, as I understand your testimony, all of the work in connection with putting this deck lashing in place was done by yourself and Mr. Dunwoody.

A. Yes, by myself and Mr. Dunwoody.

Q. What portion of that work did you actually do yourself?

A. Just lifted up the chains on one side.

Q. Which side was that?

(Deposition of John Bergsten.)

A. That was on the port side; he took the star-board side.

Q. What did you do with the chain when you lifted it up?     A. I just past it to Dunwoody.

Q. At that time did he have hold of the chain on the other side?

A. Yes, he had his chain up all right and was waiting for me.

Q. Who coupled up the two chains?

A. Himself.

Q. Did you watch him while he did it?

A. No, I can't say that I did, but I was there; I can't say that I paid any special attention to shackling it in or connecting [28] it up, because we leave that to the sailors.

Q. Did you have anything to do yourself with the actual coupling up of the chains?

A. No, sir; never touched it.

Q. You say that when you next saw Mr. Dunwoody after the chain slackened, he was down in the hatch.

A. He was laying on top of a box in the hatch combing.

Q. Wasn't there a good deal of cargo underneath the hatch?

A. She was filled up,—No. 1 hatch; there probably had been seven or eight boxes taken out of the forward end that hadn't been touched.

Q. You mean all the cargo was up level?

A. There was no room for any more cargo in that hatch.

(Deposition of John Bergsten.)

Q. This chain, and this place where Mr. Dunwoody was working, where was it with reference to the hatch?

A. Right across the hatch, he was standing on boxes connecting her up. We generally don't keep turnbuckles in the center of the hatch,—for our own benefit we generally keep them on one side of the hatch combing, so we can reach over the deckload, so we don't have to crawl out from the middle.

Q. What is the distance that he fell, if he did fall?

A. I didn't measure it.

Q. Approximately.

A. At the very most six feet, because we took over 1,000,000 feet of lumber, and the usual cargo is a million and a half. The best part of a million had gone off the ship and deckload at the time this accident occurred. The hatch combing was four feet, and if he fell six feet, I am giving him the full benefit,—but I didn't measure the distance. If I say six feet I am on the safe side.

Q. How long had you known Mr. Dunwoody?

A. He joined the ship in Puget Sound. [29]

Q. How long before the accident?

A. Between a month and five weeks.

Q. Was he an experienced seaman?

Mr. WALL.—I object to the question on the ground that it calls for a conclusion of the witness, and no proper foundation has been laid.

A. Yes, he is what I would call a first-class man.

Q. During your connection with him on that ship,

(Deposition of John Bergsten.)

did you have occasion to observe him doing his work?

A. Never need to; I can tell a seaman when I see him. Inside of an hour I know what kind of a man I have to deal with. I found him a first-class seaman in connection with the work he had to do on the "Colusa."

Q. Was that one of the regular duties to be performed by seamen on this ship,—securing the deck lashings?     A. Yes, sir.

Q. Had Mr. Dunwoody been called upon to perform this same duty before?     A. Yes, sir.

Q. Did you examine the chain, turnbuckle and hooks after Mr. Dunwoody was injured?

A. Yes, sir.

Q. Did you find any break, or anything wrong with it?

A. No, sir; the same chains and turnbuckle are there in the "Colusa" now as when this accident happened.

Q. Do you know why the chains parted on this particular occasion, of your own knowledge?

A. Only what I surmise,—I don't know. Either the ring we got over the slip hook wasn't set tight fast, or there was no nail put in the hole to hold the ring there. That is the only thing I can think of.

Mr. WALL.—I move to strike out the answer of the witness as a surmise on his part, the witness having testified that he does not know. [30]

Mr. PALMER.—Q. From your experience as a chief officer, and from your experience with tackle



(Deposition of John Bergsten.)

of this kind would, or would not, in your best judgment, what you have just explained in your previous answer, have caused this particular parting of the chains?

Mr. WALL.—I object to the question on the ground that it is incompetent, irrelevant and immaterial and is calling for a conclusion of the witness, and as to it not being the testimony in regard to the actual facts as to what did occur.

Mr. PALMER.—Q. In other words, Mr. Bergsten, I don't think you just understand my question. You have just explained in your previous answer what you think caused the break. Now, what I am asking you is as to whether your answer to that question, based upon your experience as a mariner and chief officer,—is that what caused the break in your best judgment?

Mr. WALL.—I make the same objection as to the question immediately preceding.

A. Yes, sir, from my best judgment, that is the only thing that could cause the chain lashing to part. If any other thing had happened, it would have showed on the turnbuckle or chains, which were O. K.

Mr. WALL.—I move to strike out the answer for the same reasons assigned in my last motion to strike out the answer of the witness.

Mr. PALMER.—Q. You have just testified that Mr. Dunwoody connected up the two ends of this apparatus? A. Yes, sir.

Q. In connecting that apparatus, what would he

(Deposition of John Bergsten.)

have to do, or what did he do?

Mr. WALL.—That is, if you know,—if you saw him do it.

A. I saw him connecting up everything,—he went to get his pipe wrench and set up this chain lashing.

[31]

Q. Will you explain more in detail just what operations he would go through when he connected the two ends of that chain, so that we can have a more definite idea of the apparatus and the motions he went through?

A. When Dunwoody got the two chains together, he had to go and get a little tackle,—block, rope and tackle,—so as to hold these two chains together, to get this turnbuckle and shackle on; he chained one side, and he put a hook on the other side; to set the chains he had to get them together, which he did. While I was standing and looking at him, when he got his turnbuckle and shackle on, he let go his tackle and took it off, and this turnbuckle was on and the chains in position ready for to put weight on it. He got his pipe wrench and started to set the chains up,—

Q. (Interrupting.) Now, in making a connection such as was made that day between the two ends of those chains, did anybody, who was making such a connection, have to adjust this ring which you have just spoken of as being the apparatus which probably slipped off?

Mr. WALL.—I object to the question on the

(Deposition of John Bergsten.)

ground that it is leading and because it calls for a conclusion of the witness.

A. If that ring wasn't put on in the side hook, he couldn't set the chains up; that ring has to go over the slip hook for to set the turnbuckle up.

Mr. WALL.—I move to strike out the answer as not being responsive to the question.

Mr. PALMER.—And it would have to be adjusted at the same time.

A. Yes, sir.

Q. Then when Mr. Dunwoody made that connection that day, in order to make the connection, would he have to slip that ring over [32] the hook and put in a pin,—would he or would he not?

Mr. WALL.—I object to the question on the ground that it is leading and also because it calls for a conclusion of the witness.

A. Yes, sir; he had to put that ring on and secure it,—the way it ought to be done by putting that iron bolt or a threepenny nail into it, which was always used, and which he knew where to find,—to put into that hole.

Mr. WALL.—From the answer I move to strike out all after the words "iron bolt," as not being responsive to the question and as being a conclusion of the witness.

Mr. PALMER.—Q. Did you or did you not notice Mr. Dunwoody as he slipped the ring over the hook?

A. No, sir.

Q. Did you, or did you not, see him put a pin in the hole which you have described?

(Deposition of John Bergsten.)

Mr. WALL.—I object to the question as leading.

A. No, sir; I didn't see Mr. Dunwoody put anything in the hole in that hook.

Mr. PALMER.—Q. What is the usual type of pin which was used to put into that hole, to hold that ring, on the steamship "Colusa"?

A. A threepenny nail.

Q. Did, or did not, a threepenny nail fit the hole?

Mr. WALL.—I object to the question as leading. At this time I protest particularly against such leading questions and I insist that no more be asked.

Mr. PALMER.—Q. State whether or not a threepenny nail would fit this hole?

Mr. WALL.—I object to that question as leading.

A. Yes, sir; it would just fit the hole.

Mr. PALMER.—Could any larger bolt have been inserted into it? [33]

A. Yes, but not very much larger. We always use a threepenny nail, but there is room to get a little larger pin in, but we always used a threepenny nail.

Q. Did you find any signs of there having been a nail in this hole after the accident?

A. No, sir; after we carried Dunwoody aft, I returned forward to see if anything broke, and I found everything all right except this link was slipped off and the chains disconnected, which couldn't have been disconnected any other way without the link slipping off.

Q. Did you find the link off?

A. The link couldn't come off.

Q. Was the link broken?



(Deposition of John Bergsten.)

A. No, sir; it is on the ship to-day.

Q. Do you know, of your own knowledge, whether there were available at that time threepenny nails on the "Colusa"? A. Yes, sir; lots of them.

Q. Where were they kept?

A. From where Dunwoody was standing, they were kept twenty feet away.

Q. In what kind of a receptacle?

A. We have a square box with different compartments for different sized nails. We generally keep them in the boatswain's locker which was about twenty feet away from where Dunwoody was standing.

Q. And they were where the seamen could get them? A. Get them any time.

Q. Were there any other persons close at hand at the time of the accident?

A. No, sir. What do you call close?

Q. So far as you could see,—that saw what happened? [34] A. No.

Q. Then so far as your own knowledge goes, you were the only witness of Mr. Dunwoody's accident?

A. Nobody knew anything about the accident until I came and got him. The other men were about seventy-five feet away, busy performing ship's duties; when they are busy they don't look around at anybody.

Q. Nobody came up to the scene of the accident until you called them,—is that your testimony?

A. Yes, that is correct.

(Deposition of John Bergsten.)

Q. After the accident, what did you do with Mr. Dunwoody?

A. We picked him out of the hatch and carried him to just outside of the entrance to the saloon, or dining room would fit it better.

Q. I don't want the details, but I want to know is, did you take him to a doctor at any time?

A. Two hours after this happened, I personally took him ashore and got him attended to.

Q. How long did he remain on the ship after the accident?     A. About two hours.

Q. After he left the ship entirely?

A. He left us down at San Pedro on the 22d.

Q. About how long was that after the accident that he left the ship at San Pedro?

A. That must have been six weeks after the accident that he left the ship,—somewhere around there—I don't remember the number of days; I could trace it up if necessary, because that is in the log-book.

Q. What was his appearance at the time he left the ship at San Pedro, so far as you could judge yourself?

A. Of course his arm looked all right; so far as I could see his arm was on the road to recovery, the way it ought to be. [35]

Q. Was he able to move it around?

A. Yes, sir.

Q. Was it in a sling?

(Deposition of John Bergsten.)

A. The sling had been off his arm about three weeks or a month.

Q. Was he boarded on the ship during these six weeks?    A. Yes, sir.

Mr. PALMER.—I think that is all now, but I may probably think of another question.

Cross-examination.

Mr. WALL.—Q. How long had you been on the “Colusa” at the time of the accident?

A. You mean altogether?

Q. Altogether, yes.

A. About five months.

Q. What part of the deck was the starboard shackle?

A. Just straight down the main deck.

Q. Was it out to the side of the ship, or was it in alongside of the hatch?

A. On the side of the ship.

Q. And the bolt on the other side was outside of the ship on the port side?    A. Yes, sir.

Q. And the two deck lashings came up and over the deckload; and were they brought together in the middle of the ship or on one side?

A. On one side.

Q. Which one?    A. On the port side.

Q. How far over on the port side?

A. About four feet.

Q. From the center?

A. No, from the hatch combing. We always have one end of the turnbuckle over on the deckload so

(Deposition of John Bergsten.)

we can reach from the deckload,—about three feet.

[36]

Q. At the time that Dunwoody fell he was behind you?     A. Yes.

Q. And you were standing just where?

A. On the port side,—on the port side on top of the deck load with my feet on top of the chains, feeling the weight of the chain as he was setting it up.

Q. Did you feel a strain on the chain at that time?

A. Yes, sir.

Q. As I understand you to say, the last that you actually saw of Dunwoody before the accident was when he had gone to get the pipe wrench,—is that correct?     A. Yes, sir.

Q. That is a Stillson wrench?

A. It is the same thing,—we call it a pipe wrench on the ship.

Q. This hook that was on one end of the turnbuckle,—was that in the port side or on the starboard side?     A. No, it was on the port side.

Q. Was the starboard side of the turnbuckle where it was fastened to the chain,—was that fastened to the chain permanently?

A. No, sir; it was shackled in for the time being, by putting the shackle in the chain and slipping a bolt into the turnbuckle and screwing it up.

Q. Was there a nut screwed on the outside of the bolt?

A. There was no nut on that,—the bolt wasn't made to put any nut on,—couldn't be put on.

Q. When was that screwed on?



(Deposition of John Bergsten.)

A. By himself at that time.

Q. So that the turnbuckle was brought there at the time and put on?     A. Yes, sir.

Q. The port side had a hook in?

A. At the time it did. [37]

Q. How was it at this particular time?

A. It happened to be shackled in on the starboard side with a hook over on the port side.

Q. Now, the hook hinged about the middle, about where the chain went over the hook?     A. Yes, sir.

Q. So that hinge would drop down?

A. Yes, sir.

Q. Is this ring put over the upper part of the hook?     A. Yes, sir.

Q. Where does the other part of the ring fit?

A. That fits on the shank of the same hook.

Q. So that the link runs loose?     A. Yes, sir.

Q. When the deck lashing is in place and the hinge part of the hook is in place, then the link is put over the hinge part of the hook?     A. Yes, sir.

Q. And after that the pin is put through the hole in the upper part of the hinge part of the hook?

A. Yes, that is correct.

Q. Who had charge of the turnbuckles on board the ship?     A. Nobody in particular.

Q. Who has charge of the gear and equipment on the "Colusa"?

A. Myself and the boatswain under my supervision.

Q. That is the usual custom on merchant vessels, that the first officer has charge of the gear and equip-

(Deposition of John Bergsten.)

ment, with the boatswain under him?

A. Yes, sir.

Q. Where was the turnbuckle kept when not in use?

A. On the starboard underneath the forecastle-head in a locker.

Q. Was the locker kept locked?

A. Yes, down in Central America.

Q. Who kept the key?     A. The storekeeper.

Q. Did the boatswain generally get things out of the locker?     [38]

A. No, when we left, we opened the lockers, and whatever we needed we would let the men go and get for themselves; but in port the lockers are locked.

Q. And when the men want to get something out of the lockers either the boatswain or you would give on order on the storekeeper?

A. We generally told the storekeeper that we were going to set up so and so, and let the boys have what they want.

Q. How many turnbuckles of this description were there on the "Colusa" at that time?

A. About 32 or 34—say 30 to be sure.

Q. At least 30?     A. Yes.

Q. Did they get any of these turnbuckles since you have been on board of her?

A. No, sir; they are in the same condition as when I joined the ship.

Q. They didn't get any new ones, while you were on board?

A. No, sir; they were in good condition when I

(Deposition of John Bergsten.)

went there and in good condition when I left; none been broke.

Mr. PALMER.—I ask that the answer be stricken out as not responsive to the question.

Mr. WALL.—Q. The whole thirty were kept in the locker when not in use?     A. Yes, sir.

Q. When were they overhauled by you, if they were overhauled by you at all, during the time that you were upon her?

Mr. PALMER.—I object to the question on the ground that it is incompetent, irrelevant and immaterial, and has no reference to this particular turnbuckle in question.

A. Every time we set them up, before they are used, there was always a man detailed to overhaul them. [39]

Q. Did you give this turnbuckle to Dunwoody before he used it?     A. No, sir.

Q. Did you detail a man to overhaul this particular turnbuckle before it was given to Dunwoody?

A. No, sir.

Q. Had this turnbuckle ever been used for setting up a deck-load on this voyage before, so far as you know?

A. It was just taken off twenty hours before.

Q. In this port?     A. Yes, in this port.

Q. Do you know who took it off?

A. One of the men.

Q. Do you know whether it was put back into the locker?

A. Yes, sir; all turnbuckles used are put back,—

(Deposition of John Bergsten.)

they had to put them back or they steal them.

Q. Do you know, of your own knowledge, or are you just testifying as to what is customary or habitual?

A. I know that they were put away, because there were none on deck.

Q. Did you tell Dunwoody to go and get a turnbuckle?

A. Yes, I told Dunwoody to set up the deck lashings over No. 1 hatch, which meant that he would get everything which he required for that job.

Q. You didn't specially tell him to go and get a turnbuckle,—you just told him to set up the chain lashings on that job; that is the fact, isn't it?

A. Yes, sir.

Q. What was the boatswain's name on that ship?

A. His name was,—I think it is Dallman.

Q. Do you know where the boatswain was during the time that this setting up was going or from the time it began until the accident? [40]

A. Yes, sir.

Q. Did you see him?      A. Yes, sir.

Q. Where did you see him?

A. Right across No. 2 hatch.

Q. Where is No. 2 hatch with reference to No. 1?

A. Just behind it,—probably 75 feet away from where I was standing,—abaft No. 1 hatch.

Q. Can you swear positively, of your personal knowledge, that the boatswain was not around No. 1 hatch from the time that Dunwoody started to work to get the gear until the time of the accident?



(Deposition of John Bergsten.)

A. Yes, I can.

Q. How can you so testify?

A. Because the boatswain never came near to help carry Dunwoody out of the hatch.

Q. You were up on the deckload over on the port side?     A. Yes, sir.

Q. Was there a deckload over on the star-board side?     A. Yes, sir; even.

Q. What sort of a passage-way was there between the deckloads on each side and the deck combings?

A. No. 1 hatch was empty.

Q. You said that there was a space of about three feet?

A. I said there was about three feet to where Dunwoody fell.

Q. Was the deckload right up against the hatch?

A. About two inches is allowed for us to reach our hands down to do anything that is required.

Q. And it was the same way with the deckload on the starboard side?     A. Yes, sir.

Q. How far did the forward end of the deckload on your side [41] extend forward of No. 1 hatch?

A. Up to the bulkhead—to the forecastle head.

Q. How far aft did the after end of the deckload extend,—how far aft of No. 1 hatch did it extend on your side?

A. Right up to the midships bulkhead.

Q. And about how far was the midships bulkhead from the after end of No. 1 hatch?

A. About 125 feet,—I ain't sure,—inside of a few feet.

(Deposition of John Bergsten.)

Q. You say No. 2 hatch was about 75 feet from No. 1 hatch?

A. No, I said that the boatswain was about 75 feet from where I was. The deckload was even right where he was standing, right across the ship; from where the boatswain was standing, he could see all over the forward end of the "Colusa" if he wanted to.

Q. If he wanted to come up to No. 1 hatch, he walked forward on the deckload?     A. Yes, sir.

Q. You said that they used a 3-penny nail or a bolt for the hole in the hook?     A. Yes, sir.

Q. How many of these turnbuckles had bolts on them?

A. All of them when they were in use,—either a bolt or a 3-penny nail.

Q. What part of them had bolts, and what part had 3-penny nails?     A. Only one part.

Q. What portion of the 30 or more turnbuckles,—what proportion of them had bolts and what proportion had 3-penny nails in them?

A. There was no special bolt made for these turnbuckles.

Q. You said that you used a bolt or a 3-penny nail?

A. Yes, surely.

Q. On how many did you use bolts, and on how many did you use 3-penny nails?     [42]

A. Whenever we got hold of bolts, in this nail box, we put them in, and if we didn't find any bolts, we used nails.

Q. What did the bolts look like?

A. Just like a nail with the head cut off.

(Deposition of John Bergsten.)

Q. Were these 3-penny nails round nails or old-fashioned nails?     A. They were wire nails.

Q. So that you don't know, of your own personal knowledge, whether there was a nail used in this case, or whether there was a bolt used?     A. I don't know.

Q. Did you, yourself, ever put a nail in this particular turnbuckle?

A. That I couldn't answer because they are all alike.

Q. The turnbuckles are all alike, or the nails all alike ?

A. (Continuing.) That I couldn't say, because they are all alike; I might have handled that turnbuckle.

Q. Are the holes all alike?

A. They are all alike.

Q. You don't know how old that turnbuckle was?

A. The ship was only four years old.

Q. You don't know what particular turnbuckle was used at that particular time?

A. I don't know which particular turnbuckle was used at that particular time. If we need a turnbuckle for any purpose we get one.

Q. This is the fact then that one of the thirty or more turnbuckles on that ship was used, but you don't know which one of the thirty was used at that time,—that is the fact?

A. Yes, that is the fact.

Q. You don't know, then, whether the hole in the turnbuckle which was used, was larger or smaller than the hole in the other turnbuckles, of your own

(Deposition of John Bergsten.)

personal knowledge? [43]     A. Yes, sir.

Q. How?

A. Because they were all punched alike,—that is, all out of one pattern,—all punched with one punch.

Q. Were you there when they were punched?

A. No, sir.

Q. You didn't see them punched?     A. No, sir.

Q. You don't know which particular turnbuckle was used at that time,—you said you didn't know which one of these particular turnbuckles was used at the time of the accident?     A. Yes, sir.

Q. You don't know whether the hole in the particular turnbuckle which was used was larger or smaller than the hole in the others?

A. I don't know,—they were all alike.

Q. You don't know, because you think that they were all alike when they were in use?

A. Yes, sir.

Q. What are they made of,—this part of the turnbuckle?     A. Iron.

Q. What sort of iron?     A. Flat iron.

Q. Wrought iron?     A. No, sir; steel.

Q. How do you know it is steel?

A. If I am not mistaken, I have got bills on the ship which call for steel hooks.

Q. But you don't know, Captain, of your own personal knowledge, whether it was cast iron, or wrought iron, or steel, do you?

A. I do,—I know it is not cast iron,—I am positive of that.



(Deposition of John Bergsten.)

Q. But you don't know whether it was wrought or steel?

A. No, sir; I will take that back, but I know it was not cast iron.

Q. You don't know whether this particular turnbuckle had been used a great deal more than the others, or whether it had been [44] used a great deal less than the others?

A. Yes, I know, because they use them all except on particular short runs.

Q. It is a fact that you do not know, and you cannot know, whether the hole in this hook had been worn out to a certain extent by use, of your own personal knowledge?

Mr. PALMER.—I object to the question on the ground that it is argumentative.

A. Yes, sir.

Q. How?

A. If that had been worn out we would have known it, because we have a standing order from Grace & Co., on every trip, to send all equipment ashore to be repaired,—on every trip as we near home, we examine the equipment to see what is needed to be repaired.

Q. You don't know, and you can't know, of your own knowledge, whether the hole in this particular hook had been worn out more than the holes in the other hooks. Do you understand that question?

A. Yes, sir. When I picked up the turnbuckle, after the chain had parted, it was in the same condition as the rest of the turnbuckles were, and the hole

(Deposition of John Bergsten.)

was in a good state,—in good shape.

Q. Did you take a nail or bolt and put it into the hole after the accident?

A. No, sir; I picked up the turnbuckle and looked at it.

Q. Was there any way on that turnbuckle or hook for fastening or lashing the bolt?

A. We always put in lashing on in bad weather.

Q. No, I am talking about the turnbuckle itself. Was there any eye or a small hook, or anything of that kind for fastening the bolt or nail in the hole?

A. No, sir. [45]

Q. Was there anything on that hook, or on that turnbuckle for lashing the bolt and securing it after it had been put in the hole?     A. No, sir.

Q. Now, you say you examined that hole after the accident. You said also that you could put a bolt or a nail larger than a 3-penny nail into the hole?

A. Yes, sir.

Q. Just how much larger bolt, or how much larger nail, could you have put into it right after the accident?

A. Just a fraction,—that is all.

Q. So that, as a matter of fact, then, the 3-penny nail, when it was put in would work loose, if you could put in something larger than a 3-penny nail?

A. No, sir; there would be the weight on it. Whenever a nail is put in there, there is a bend in it.

Q. Do you bend it?     A. We bend them.

Q. Did you bend this one?

(Deposition of John Bergsten.)

A. I didn't,—if I did it personally, I would have bent it.

Q. You were there in charge, seeing that the lashing was properly set up?

A. Yes, sir; I was in charge of all the work on the "Colusa."

Q. But this particular job, you were at the No. 1 hatch in charge of seeing that the lashing where the turnbuckle that Dunwoody was working with,—you were in charge of seeing that it was put up properly?

A. I was superintending the work,—looking after it to see that I got a certain amount of strain on that chain that I wanted.

Q. You were in charge of seeing that the deck lashing was properly set up? A. Yes, sir. [46]

Q. How long was the 3-penny nail, or the bolt that was generally used in this hook,—how long was it in inches?

A. (Indicating.) This is about the size,—about 3 inches.

Q. How high did you say that the deck-load was about the hatch combing of No. 1 hatch?

A. Between 3 and 6 feet,—I didn't measure.

Q. How much cargo was taken out of that hatch just before the accident,—how much cargo had been taken out of No. 1 hatch?

A. There were three or four boxes that I took out and put on the deck,—about three or four boxes on the forward end. This happened on the after end of No. 1 hatch. There are three sections to each hatch.

(Deposition of John Bergsten.)

Mr. WALL.—I think that is all.

Redirect Examination.

Mr. PALMER.—If there had been any cover on the hatch, would there have been any difference in the distance that Mr. Dunwoody fell?

A. No, sir.

Q. Practically the same?

A. The only difference is four inches.

Q. I will ask you again,—did you examine this turnbuckle shortly after the accident?

A. I examined it immediately after I got Dunwoody off the deckload aft.

Q. In what condition was it?

A. In good condition.

Q. Was the hole that we have spoken of here,—did it show any signs of wear?

A. No, sir; it was in first-class condition.

Q. And the chain, and the hook, and all the rest of the apparatus that was there,—in what condition were they? [47]

A. In good condition.

Q. You spoke about bending a nail through them, when was the nail bent, when is it generally bent?

A. After the deck lashing is set tight, they generally take a hammer and bend them.

Q. Every time they set up the deck lashings, and hook up the turnbuckle, they have to put in a new nail?    A. Yes, sir.

Q. And you have testified that those nails were available for the men to use?    A. Yes, sir.

Q. Other than his broken arm, did Mr. Dunwoody,



(Deposition of John Bergsten.)

complain of any other injuries in particular of any consequence?

A. No, sir; I know his leg was bruised a bit, but he never complained about it. He spoke to me about it, but he never made any complaint about it.

Q. So far as you know, his bruises healed up?

A. Yes, sir.

Mr. PALMER.—That is all.

Mr. WALL.—That is all. (Continuing.) The reading and signing of the deposition by the witness is hereby waived. [48]

State of California,

City and County of San Francisco,—ss.

I, Charles R. Holton, a Notary Public in and for the city and county of San Francisco, State of California, do hereby certify that the witness in the foregoing deposition named John Bergsten was by me duly sworn; that said deposition was then taken at the time and place mentioned in the foregoing stipulation, to wit, on Friday, the 29th day of December, 1916, at the hour of 2 o'clock P. M. of said day, in the law office of Messrs. Goodfellow, Eells, Orrick & Moore, located in the Insurance Exchange Building, San Francisco, California; that said deposition was taken down in shorthand by me, and thereafter carefully transcribed into typewriting under my supervision; and that the foregoing is a full, true and complete transcript of the shorthand notes taken by me at said deposition; and I further certify that, at the taking of said deposition, the reading and signing



ments of bail and affidavits, etc., Carl Pfautsch, a witness called on behalf of the libelant.

F. R. Wall, Esq., appeared as proctor for the libelant, and George K. Ford, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the libelant at the office of F. R. Wall, esq., in the Merchants' Exchange Building, in the city and county of San Francisco, State of California, on Wednesday, December 27, 1916, before Thomas E. Hayden, a United States Commissioner for the Northern District of California and in shorthand by E. W. Lehner.

It is further stipulated that the deposition, when written [50] up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.

**Deposition of Carl Pfautsch, for Libellant.**

CARL PFAUTSCH, called for the Libellant, sworn.

Mr. WALL.—Q. What is your business, Mr. Pfautsch; what do you do for a living?

A. I am a sailor.

Q. Were you on the "Colusa" at any time this year?

A. I came on board in Callao, and worked up my passage to 'Frisco on the ship, and then I was three weeks on shore, and then I went back and made a trip for two months and a half.

Q. Were you on board of her at the time the libellant over here, Dunwoody, was hurt?     A. Yes.

Q. You were on board as a seaman?

A. Yes, I was a seaman on board.

Q. State whether or not you helped Dunwoody with the deck lashings in any way? Did you help him with the deck lashings in any way that day that he got hurt?

A. With that chain, where it happened?

Q. Yes.     A. I helped him.

Q. Who else was with you at the time you were helping him?

A. There was the boatswain and the deck boy and another sailor, [51] or two more sailors; I don't remember; I am not sure; I was there and Dunwoody and another sailor, and the boatswain; there was another sailor who was down there, but I don't know if he was helping or not.



(Deposition of Carl Pfautsch.)

Q. Was the deck boy there?

A. The deck boy was there, yes.

Q. Now, tell just what you did in helping him with the lashing, the deck lashings?

A. I helped him, I pulled the tackle—we pulled the tackle together.

Q. What was this tackle used for?

A. To get the chains together.

Q. To get the two ends of the chains as near together as you could.

A. As near as possible, and then to get what we call the turnbuckle in.

Q. To get the turnbuckle in between the two chains?     A. Yes.

Q. When you were pulling on the tackle to get the two chains together, was the turnbuckle there at that time?     A. Yes, it was on the starboard end.

Q. It was on the starboard end of the chain?

A. Of the chain, yes.

Q. It was on the end of the starboard chain, there?

A. Yes.

Q. Go ahead and tell what else you did. Was the other end of this turnbuckle hooked up while you were there, with the port chain?

A. Yes; while I was there we pulled it tight and we hooked it in; we hooked that end of it in the other chain and then we left to tighten up the other.

Q. State what, if anything, was done about putting the link over the end of the pelican hook.

A. I don't know who done that.

Q. State whether or not the link was put on before

(Deposition of Carl Pfautsch.)

you left. A. Yes, the link was put on.

Q. State whether or not the pin was put in the hole?

A. Yes, there was a nail.

Q. A nail was put in the hole above the link?

A. Above the [52] link, yes.

Q. State whether or not you saw the nail in there before you went away?

A. I saw the nail in there.

Q. Do you know who put the nail in there?

A. No, I couldn't tell you.

Q. Where was the first officer? Do you know the name of the first officer of the ship?

A. Bergsten.

Q. Where was the first officer?

A. He was on the fore-castle-head.

Q. What were they doing up there, then?

A. He was heaving anchor.

Q. Now, then, after you got through working there—this was at No. 1 hatch, where you had been doing this? A. Yes.

Q. After you got through working there, where did you then go?

A. We went to the next deck lashing—not to the next—we left one out.

Q. You went to the one next after that?

A. After, yes.

Q. Near what hatch was that? A. No. 2 hatch.

Q. About how far was No. 2 hatch from No. 1 hatch, to the best of your judgment?

A. About 50 feet.

(Deposition of Carl Pfautsch.)

Q. Who went with you when you went aft to No. 2 hatch?

A. The boatswain, the deck boy, and another sailor, Alm.

Q. How long was it after you left No. 1 hatch before the accident happened?

A. Only a few minutes.

Q. What do you mean by a few minutes; one minute, or two minutes?      A. Two minutes.

Q. Only a couple of minutes?

A. A couple of minutes.

Q. Now, when you started to work at No. 1 hatch, at the deck lashing at No. 1 hatch with Dunwoody, who was in charge of your group?

A. Of this work that we done?

Q. Who was in charge of the men in that group?

A. The boatswain.

Q. Who gave the orders to tighten up the deck lashings, to set [53] up the deck lashings and tighten them up?      A. The boatswain.

Q. What sort of a nail was it that was put into the top of the pelican hook, over the top of the ring? That is, was it a round nail or was it one of these old-fashioned wedge-shape nails?

A. No, it was a round nail, about 4-inch, I guess.

Q. About how long?      A. Four inches long.

Q. State, if you know, how the nail fitted into the hole, whether it fitted in tight, or whether it fitted in loosely?      A. It was loose.

Q. Now, after the accident happened, did you go

(Deposition of Carl Pfautsch.)

forward after the accident happened to where he was hurt?

A. Yes; the mate called us forward and told us to get that man out of the hatch.

Q. Did you examine or look to see whether or not the nail was in the hole?     A. It was gone.

Q. The nail was gone?     A. Yes.

Q. It was not in the hole when you went forward?

A. No.

Q. What was the distance from the top of the deck-load to the hatch coming there at No. 1 hatch where he was working?     A. About nine feet.

Cross-examination.

Mr. FORD.—Q. I want to ask you this first: Who have you talked to about this matter before now?

A. What?

Q. Who have you talked to about the matter you have been questioned about before just now?

A. I met Dunwoody yesterday and he asked me to come up here and make a statement; that is all.

Q. You did it, did you?     A. Yes, I did.

Q. How did you happen to notice this nail that was put in this pelican hook, in the ring from the pelican hook?     A. How do you mean?

Q. How did you happen to notice that? That was done always, was it not?

A. Yes, that was always done.

Q. How did you happen to notice at this particular time what kind of a nail was used?

A. We used always the same nail.     [54]

Q. Did you use the same kind of nail this time?



(Deposition of Carl Pfautsch.)

A. Yes.

Q. Who put it in there?

A. I can't remember that.

Q. How did you notice it was the same kind of a nail that you always used?

A. Well, because we used the same nail—we had to tighten up some more of these turnbuckles, and we used the same kind of nail.

Q. What I want to get at is, did you actually see that nail in the pelican hook, or are you just stating that because you always used it?

A. No, I saw the nail.

Q. How did you happen to see it?

A. Well, because we always used the same kind of nail.

Q. Did you, on this particular occasion, see the kind of nail that was used, or are you just saying that because that was what you always did? Which?

A. Well, I can't say exactly, but I know that was the same kind of nail.

Q. To get my question, I am not doubting your statement in the matter, but all I want to find out is whether you knew this or not. When you are asked to tell anything here, all you are to tell is what you saw. A. Yes.

Q. Not what Mr. Dunwoody told you, or what somebody else told you, but what you know yourself. Do you know, yourself, that the same kind of a nail was used as was always used? Did you actually see it yourself? A. Yes, I saw the nail.

Q. Was there anything about it that attracted

(Deposition of Carl Pfautsch.)

your attention?     A. No, nothing.

Q. You just answered here that it was loose in the hole. How did you happen to notice that?

A. It was loose, it must have been loose, because it was gone.

Q. You did not see it was loose, did you?

A. No.

Q. Through anything you saw there, you don't know whether it was loose or not, do you?

A. I could not say. [55]

Q. That is just exactly what I thought when you answered me.     A. But I know it was gone.

Q. You know it was gone?     A. It was gone.

Q. Let me ask you this: Are you able to say right now that there was a nail put in there at all?

A. Yes, there was a nail in there.

Q. You actually saw it yourself?     A. Yes.

Q. Not because you always put one in, but in this case you saw the nail?     A. Yes, I saw it.

Q. Were these lashings tightened up the same way they always are on these occasions?

A. The lashings, yes.

Q. If the same kind of a nail that was always put through that hole was put in there, there was no reason for its coming out, was there?

A. No. The reason it came out was he turned the turnbuckle, and that hole was upside down.

Q. Who turned the turnbuckle?

A. Dunwoody, and it fell out.

Q. He turned the turnbuckle so that the hole was upside down?     A. Yes, and the nail fell out.

(Deposition of Carl Pfautsch.)

Q. How should he have turned it?

A. That was the right way to turn it; it would happen no matter which way he turned it; the nail was loose and it has got to fall out.

Q. How do you know the nail was loose? You are just simply stating your conclusion because the nail came out, are you? A. Yes.

Q. You don't know that yourself?

A. No, I didn't see it fall out.

Q. For all you know he might have pulled it out?

A. I could not tell you that.

Q. For all you know about it, from anything you saw—you don't know what caused the accident, do you, from anything you saw yourself? A. No.

Q. You were not there when the nail came out, if it did come out, [56] were you?

A. No, but I could think it—I knew how it happened. I did not see it.

Q. You can conclude what happened, but you don't know what happened, do you? A. No.

Q. You don't know from anything you saw with your eyes what happened? A. No.

Q. All you know is that Mr. Dunwoody got hurt, and when you got there this hook had loosened from the place where it was fastened?

A. Yes; it was gone altogether; it fell down in the hatch.

Q. The nail was gone altogether? A. Yes.

Q. Did you find the nail afterwards?

A. No, I didn't find it.

Q. Now, what were you and the other parties with

(Deposition of Carl Pfautsch.)

you at Hatch No. 2 doing at the time that Mr. Dunwoody was over at hatch No. 1?

A. We tightened up the other.

Q. You were tightening up another?

A. Another deck lashing.

Q. Was that a separate deck lashing from the one that Dunwoody was working on?     A. Yes.

Q. It had nothing to do with the one Dunwoody was on?     A. No.

Q. You and the boatswain and this other man went to Hatch No. 2 and Mr. Dunwoody was there working alone?     A. He was working alone.

Q. So, whatever he did there, there was nobody helping him?     A. No.

Q. This pelican hook and the ring, and the other appliances that were used in tightening up, bringing the two ends of the chain together, were right in front of his eyes when he was working there, were they not?

A. Yes, he was on the deckload.

Q. He could see everything in front of him?

A. Yes.

Q. He could see whether that hole was such that the nail would drop out?

A. No, he could not see that; that was behind him.

Q. What was he working on, then? Why was it behind?     [57]

A. He was working on that screw to tighten it up, to get in together, tighten the chain together.

Q. At the time you left there, had these ends been brought together at all?



(Deposition of Carl Pfautsch.)

A. Yes, they were together, but they were not tightened up.

Q. At the time you left, was he tightening it up?

A. Yes, he was tightening it with a stillson wrench.

Redirect Examination.

Mr. WALL.—Q. You were up there when the in-board end of the port deck chain was put through the pelican hook, were you not? A. Yes, I was there.

Q. Where were you working at the time that the inboard end of the port chain was put through the pelican hook, and the ring was put in?

A. I was holding the tackle tight; we pulled the tackle and I was holding the tackle.

Q. What I mean is, how close you were up to that nail that was put in over the link; how far would you be from that?

A. I was standing right over it, right close to it.

Q. You were right over it, about how far distant from your eye to the hole in the pelican hook?

A. About six feet.

Q. Were you standing up, or were you down on the deck load? A. I was standing up.

Q. About six feet it was down below you?

A. Yes.

Q. You were standing up? A. Yes.

Q. Stand up and see how tall you are. You are not six feet tall, are you?

A. No; it is about that far.

Q. It was about six feet from your eye?

A. Yes.

Q. Now, in setting up the deck lashings with that

(Deposition of Carl Pfautsch.)

turnbuckle, was it necessary to turn the turnbuckle over?

A. You could not set it up without turning the turnbuckle over.

Q. That is, the turnbuckle turns around, does it not?     A. No.     [58]

Q. How does it work?

A. With a stillson wrench you have to turn it.

Q. Did you have to turn the turnbuckle upside down in turning it over in setting it up?     A. No.

Q. How did you turn the turnbuckle?

A. With a stillson wrench.

Q. But what I am gettin at is, you said you turned the turnbuckle upside down, Dunwoody?

A. Yes, the chain turned it; he turned it with the stillson wrench and the chain turned, and that nail fell out.

Q. What I am getting at is would it have to do that in turning it?     A. Yes.

Q. That is what I mean, it would have to do that?

A. Yes; sometimes we had to put in a spike or something to keep it from turning, keep the other end of the chain from turning.

Recross-examination.

Mr. FORD.—Q. Now, let me ask you another question: You say that in turning this turnbuckle with a stillson wrench, that this turnbuckle would have to turn upside down. That isn't true, is it? The only thing that turned in there was the central part that you took hold of with the stillson wrench, was it not?     A. Yes.

(Deposition of Carl Pfautsch.)

Q. Now, whether the part of the turnbuckle where this hook was fastened in, and which this nail was put through, or eye, rather, turned or not, would depend upon whether the person in charge of it adjusted it properly before he started to turn it, would it not? It would not have to turn over, would it?

A. No, it would not. That is right. I did not understand.

Q. Now, Mr. Wall made you say that it would have to turn over. I did not want to leave it that way, because I know better.

A. You mean that end where the pelican hook is on would have to turn? Q. Yes. A. No.

Q. It would not have to turn at all? A. No.

Q. The only thing that would have to turn would be the part of the [59] appliance that you took hold of with the stillson wrench?

A. Yes, that has got to turn, but not the other part.

Redirect Examination.

Mr. WALL.—What I want to get at is, why, then, was it the turnbuckle turned upside down and the nail dropped out?

A. I could not tell if there was grease on it or not; if it is not greased properly then the other end of the chain turns, too, with the pelican hook.

Q. That is your idea of what happened?

A. Yes.

Q. As you have told Mr. Ford, you were not there and saw it. That is your idea of what happened?

A. Yes.

Q. That the turnbuckle turned upside down and

(Deposition of Carl Pfautsch.)

the nail dropped out: Is that it?     A. Yes.

Mr. FORD.—Q. But as I understand you, you don't know from anything you saw whether it turned upside down or not. You did not see it turn upside down?     A. No, I did not see it.

United States of America,  
State and Northern District of California,  
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Wednesday, December 27, 1916, before me, Thomas E. Hayden, a United States Commissioner for the Northern District of California, at San Francisco, at the office of F. R. Wall, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared Carl Pfautsch, a witness called on behalf of the libelant in the cause entitled in the caption hereof; and F. R. Wall, Esq., appeared as proctor for the libelant, and George K. Ford, Esq., appeared as proctor for the respondent; and the said witness having been by me first [60] duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof was expressly waived.



And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in the office aforesaid this 15 day of March, 1917.

[Seal]

THOMAS E. HAYDEN,  
United States Commissioner, Northern District of  
California, at San Francisco.

[Endorsed]: Filed Mar. 16, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [61]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

GEORGE I. DUNWOODY,

Libelant,

vs.

THE STEAMSHIP "COLUSA,"

Respondent.

**Stipulation.**

BE IT REMEMBERED, that on Friday, December 29, 1916, pursuant to stipulation of counsel hereunto annexed, at the office of F. R. Wall, Esq., in

the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Thomas E. Hayden, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., Hugo Dallman, a witness called on behalf of the libelant.

F. R. Wall, Esq., appeared as proctor for the libelant, and George K. Ford, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the libelant at the office of F. R. Wall, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, State of California, on Friday, December 29, 1916, before Thomas E. Hayden, a United States Commissioner for the Northern District of California, and in shorthand by E. W. Lehner.

It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of [62] the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the

(Deposition of Hugo Dallman.)

testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.)

**Deposition of Hugo Dallman, for Libelant.**

HUGO DALLMAN, called for the libelant, sworn.

Mr. WALL.—Q. Give your full name?

A. Hugo Dallman.

Q. What were you doing for a livelihood during the time from June onward of this year?

A. I was boatswain on the “Colusa.”

Q. When did you join her?

A. I don’t know the exact date.

Q. About what time?     A. In June sometime.

Q. Of this year?     A. Yes.

Q. What month did you leave her?

A. I left her on November 23d.

Q. This year?     A. Yes.

Q. Then you were on board of her at the time that Dunwoody, the libelant here, got hurt?     A. Yes.

Q. What were you on board of her during the time you were on her?     A. I was boatswain.

Q. Were you with Dunwoody at the time that the turnbuckle across the deckload and over No. 1 hatch of the “Colusa” was put in place?

A. Yes, I was in charge of the work. [63]

Q. You were in charge of the gang working there?

A. Yes, I was in charge of putting the lashing on.

Q. Who was under your authority in the group or gang that were working there?

(Deposition of Hugo Dallman.)

A. All the sailors were under my authority.

Q. Do you remember how many of them were there?

A. Well, six—about six or seven; I don't know for sure.

Q. Where was the first officer of the ship, if you know, during the time that you were at work putting the turnbuckle in place?

A. The first officer was taking up the anchor, was on the forecandle-head.

Q. Go ahead and state what was done in regard to putting the turnbuckle in place and how it was done, and who did it, as far as you know.

A. Well, I was there, and we put on the tackles on the chains, then tightened the chains up and put on the turnbuckle, and I sent the deck boy for some nails, and I put a nail in the pelican hook, and I told Dunwoody to tighten up the turnbuckle and I went to the next lashing to put the tackles on there.

Q. I will show you what purports to be a rough sketch of the turnbuckle, and ask you if you recognize that as being a rough representation of what the turnbuckle and the pelican hook was?

A. Yes, that is right.

Q. I ask you what the black circle or spot is there in the end of the pelican hook, between the two capital letters "N" and "N"?

A. That is the hole where the split pin was supposed to be put in there; if we didn't have any we put in a nail.

Q. You put a nail in there?



(Deposition of Hugo Dallman.)

A. Yes, I put a nail in myself.

Q. What is that just below the hole marked "R" going across that way?

A. That is, you mean the link, here? That is the slip link. [64]

Q. It goes around the end of the pelican hook and—

A. (Intg.) The stem of that turnbuckle.

Q. The stem of that part of the turnbuckle?

A. Yes.

Q. And where I have marked the capital letter "H" that is where the lower part of the pelican hook worked around the link marked "L," was it?

A. Yes, that is right.

Q. That is to say, there was a hole in the lower end of the pelican hook and the link worked through that hole in the lower end of the pelican hook?

A. Yes.

Q. So that the pelican hook could move along the link "L"? A. That is right.

Q. Now, then, in this sketch here, I have drawn and marked "Fig. 1" in a circle, and "Fig. 2" in a circle; I ask you if "Fig. 2" represents roughly a continuation of "Fig. 1"? A. Yes.

Q. Then "F" will be—

A. (Intg.) The other end.

Q. (Continuing.) Would be the other end of the turnbuckle? A. Yes.

Q. And that would be the eye or ring?

A. To shackle in to the chain on the other side.

(Deposition of Hugo Dallman.)

Q. To shackle in to the inboard end of the starboard chain?

A. No, it was not inboard; it went from both sides, on the ship, from the starboard side to the port side and met in the middle.

Q. The starboard deck chain was down on the deck on the starboard side and came up and over the deckload to one amidships?

A. Yes, and met the port one amidships.

Q. And the turnbuckle made the connection between the two?

A. Made the connection between the two.

Q. This "F" end of the turnbuckle being shackled into the end of the starboard—

A. (Intg.) Starboard end of the lashing.

Q. Starboard end of the lashing?

A. That is right. [65]

Q. The part marked "T" and "T" represent the threaded parts of the turnbuckle and each end of the turnbuckle, do they?     A. Yes.

Q. And the part marked "S" is where the threaded part of each end of the turnbuckle went into the stock or center part of the turnbuckle?

A. Yes.

Q. At the point on each figure marked with a capital "O": Is that correct?

A. Yes, that is right.

Q. And the inboard end of the port deck lashing went over the pelican hook marked "P" below the link and toward what is marked "Fig. 1": is that correct?     A. That is correct.

(Deposition of Hugo Dallman.)

Q. Now, then, what did you say was put in this hole by you marked "N"?

A. I put in a nail there.

Q. What sort of a nail?

A. A nail about four inches long.

Q. And four inches long?     A. Yes.

Q. How did the nail fit into the hole?

A. Well, it didn't fit; it was too small; we didn't have anything else.

Q. The nail was too small; about how large was the hole?

A. The hole was about, I should say, three-eighths of an inch.

Q. How large was the nail?

A. It was about a quarter of an inch.

Q. Now, where was the turnbuckle between the two inboards ends of the deck lashing with reference to No. 1 hatch?

A. It was right over the hole in No. 1 hatch.

Q. What would happen to the end of that hole in the pelican hook when the turnbuckle was being set up?

A. If there were not two men to hold onto the other end of the chain, if it would turn, and the head of the nail get below, it would drop out and the turnbuckle would slip, it would give way, and the chain would come off; there should have been a split pin—there should have been some kind of a pin in there that could not fall out; a pin should come out like this to prevent it from falling out. [66]

(Deposition of Hugo Dallman.)

Q. A pin like this—

(The witness opens his two index fingers to about an angle of 20 or 30 degrees.)

Mr. FORD.—We move to strike out the last statement of the witness with reference “there should have been a split pin,” upon the ground that it is a mere conclusion of the witness.

Mr. WALL.—Q. When the nail was put into the hole in the end of the pelican hook, how did the head of the nail set against the side of the pelican hook, with reference to the ring “R”?

A. Well, lots of times that nail would go right in the hole until the head of the nail rested on the pelican hook, and all the strain would be only on one side of the nail, and the strain of that link would bend that nail and it would give way; it happened lots of times before that; it happened every time we put them on, that it slipped.

Q. Well, now, during the time that you had been on her, and before that accident, state what the fact was in regard to the deckload loosening up because of the ring slipping over the end of the pelican hook.

A. The two trips I was on the ship it happened lots of times, every time we put them on, and got a little too much strain on them, the thing would slip, it would not hold.

Q. How long have you been going to sea?

A. Ten years.

Q. How long have you been acting as boatswain?

A. Nine months.

Q. What are the duties of a boatswain aboard



(Deposition of Hugo Dallman.)

vessels plying out of San Francisco and Pacific Coast ports?

A. To take charge of the deck work as directed by the mate.

Q. What is the fact as to whether the people who work under him being under his authority and having to obey his orders, the boatswain's orders?

A. They were all under my authority.

Q. You were giving the orders and telling them what to do?

A. The mate told me what he wanted to be done, and I went ahead [67] and done the work.

Q. You tell the men, they have to obey orders?

A. Yes.

Q. During the time that you have been going to sea on this coast, both as a seaman and a boatswain, what has been the extent of your experience as to handling turnbuckles similar to this one in securing the deckload?

A. Well, I never saw any turnbuckle that the pelican hook worked like that in any ship.

Q. As to turnbuckles, generally, state whether or not you have had much or little experience with using turnbuckles; go ahead and tell us whether you have had much or little experience, and what it was.

A. I have had experience with deck lashings and rigging screws, and things like that.

Q. I will ask you whether or not you have worked also as a stevedore and rigger, or stevedore or rigger?

A. I never worked as stevedore; I worked as rig-

(Deposition of Hugo Dallman.)

ger at the Union Iron Works.

Q. Worked as rigger at the Union Iron Works?

A. Yes.

Q. In working as a rigger, state whether or not you worked with turnbuckles, in the course of your business?

A. Yes, I have handled lots of turnbuckles.

Q. Referring to "Fig. 1," and to that part marked with the letters "A," "B," showing the end of the pelican hook coming down toward the stock, I ask you if the end of the pelican hook on the "Colusa" that was used at No. 1 hatch came down toward the stock the way that is indicated by the line A B?

A. Yes, it did.

Q. From your experience with turnbuckles, in which direction should the end of the pelican hook have gone?

A. According to my experience it should have had an upward slant to prevent the link from slipping.

Q. You mean it should have had an upward slant, as indicated by the dotted line indicated A C?

A. Yes, that is right. [68]

Q. State whether or not you ever had any conversation with the first officer of the "Colusa" in regard to the turnbuckles on the "Colusa"?

Mr. FORD.—When do you refer to?

Mr. WALL.—Prior to the accident.

A. Yes, the mate, when we were talking about it, said that the turnbuckle should not be on the ship, because it was not safe.

Q. State whether or not you had one or many

(Deposition of Hugo Dallman.)

conversations with him about their not being safe?

A. Yes, it was the talk of the ship, everybody was talking about them, because they slipped every time you put them on.

Q. I mean the talk that you had with the first officer or mate, did you have one, or several, or a good many conversations?

A. I had a good many, and I told him about the turnbuckles, we ought not to put them on, they always slipped by themselves.

Q. State what he said in regard to the turnbuckles at the different conversations?

Mr. FORD.—That is objected to on the ground it is hearsay.

A. I could not tell you any particular words, but he frequently said that it was not fit to be there.

Mr. WALL.—Q. Now, then, what was the distance from the top of the deckload where this turnbuckle was put in to the top of the hatch-coaming of No. 1 hatch?

A. I should say about the height of this room.

Q. That is about how much?      A. Ten feet.

Q. Did you see Dunwoody immediately after the accident?

A. Well, I did not see when it happened.

Q. But I mean after the accident?

A. Yes, I carried him up.

Q. From where?

A. From No. 1 hold, out of No. 1 hold.

Q. How far up did you have to carry him?

A. Well, the distance from the cargo up to the

(Deposition of Hugo Dallman.)

hatch-coaming was about six feet. [69]

Q. How did you get him up?

A. There were two of us; we put a ladder down and we carried him up on the ladder.

Q. You had to put a ladder down a distance of about six feet?

A. No, we had to put the ladder down from the deckload down into the hold.

Q. From the deckload right down into the hold?

A. Yes.

Q. How far did the ladder extend down into the hold from the top of the hatch coaming, to your best judgment?     A. About six feet.

Q. State what the fact was in regard to whether or not cargo had been taken out of that No. 1 hold before you got to Paita?

A. Yes, cargo was taken out at La Union.

Q. At La Union?     A. Yes.

Q. State whether or not there was any hatch cover on that hatch at the time that you took Dunwoody out of the hold?

A. No, there was no hatch cover on it.

Q. When was the hatch cover taken off, if you know?

A. The hatch cover was taken off at La Union.

Q. When was it put back on, if you know?

A. It was put on after we left Paita—no, after we left Callao.

Q. That was the next port?     A. Yes.

Mr. WALL.—We will introduce this in evidence



(Deposition of Hugo Dallman.)

and ask that it be marked "Libelant's Exhibit 1, Dallman."

(The diagram is marked "Libelant's Exhibit 1, Dallman.")

Q. State, if you know, whether or not there were any of these pins on board of the "Colusa" that flared out?

A. Yes, there were some pins, but not for the turnbuckles.

Q. But not for the turnbuckles?      A. No.

Q. Now, state whether or not in your opinion as a seafaring man, the nail which was put into that hole in the end of the pelican-hook was a fit pin to put in that place?

A. Well, it should have been made to prevent it from falling out, but we could not do [70] that, because that would have bent the nail; the ring would have gone right over the nail and given way right there.

Q. State what the fact was, if you know what the fact was, in regard to the nail being bent and the ring slipping over when a pressure was brought on the turnbuckle?

A. With almost any turnbuckle, if you put any little strain on it, by the strain of the ring coming on the nail and bending over the nail, it will go over the nail and give way.

Cross-examination.

Mr. FORD.—I want you to look at that very closely and tell me if you think that is a fair representation, and particularly that a slant is shown?

(Deposition of Hugo Dallman.)

A. That slant is shown.

Q. That is a fair representation of that hook, is it?

A. It is not an exact drawing.

Q. You say it is not an exact drawing; wherein is it not exact?

A. It is exact to the point where the ring came over, that the hook slants down.

Q. It is exact up to the point where the hook slants down: Where isn't it exact?

Mr. WALL.—I would like to have the record show that when the exhibit was offered in evidence it was only offered as a rough representation of the whole of the turnbuckle.

Mr. FORD.—Q. Here is what I am getting at. That is not a fair representation at the point marked "B," is it?

A. If you take me to the office and show me that turnbuckle, I will show you.

Q. I am going to let you examine that turnbuckle, because you have given this diagram as a representation, I take it.

A. As a rough sketch, yes.

Q. Now, then, where doesn't it properly represent that turnbuckle, so far as the end marked "B" there, is concerned?

A. The end "B" is all right. [71]

Q. Where isn't it all right?

A. Of course, I am not an expert drawer, but it went like this, and the end where the ring went in went down instead of up.

(Deposition of Hugo Dallman.)

Mr. WALL.—Went down toward the stock of the turnbuckle?

A. Yes. I do not say this is accurate; this is a rough sketch; but I say this, where the ring was slipped over, that the turnbuckle went down.

Mr. FORD.—Q. Did you make this drawing?

A. Yes, I drew that; I made a rough sketch.

Q. You made this sketch that has been marked “Libelant’s Exhibit 1, Dallman”? A. Yes.

Q. As I understand, that fairly represents it?

A. Fairly; the end we are most concerned about went down this way.

Q. What make was this turnbuckle?

A. What do you mean?

Q. What make was it, would you say?

A. What metal it was made of, do you mean?

Q. Was it made by some particular concern?

A. I don’t know who made it; it was on board when I got there.

Q. You say you never saw one before?

A. I never saw a turnbuckle that slanted as much as this one did down.

Q. Did you ever see a turnbuckle of that make before?

A. I saw lots of them, but this link goes through this link here.

Mr. WALL.—Q. Pointing at which link that goes through which link? Indicate the link on the diagram?

A. This link “R” went through this link—

Q. Through this eye, you mean, marked “E”?

(Deposition of Hugo Dallman.)

A. Yes.

Mr. Ford.—Q. All you ever saw before were that way?

A. Not all of them; I saw one like this, too, but it is not extended to this far.

Q. You have seen hundreds of the make of that, haven't you?

A. No, I have never seen them with the link coming down this way; [72] I never saw one.

Q. Did you ever see turnbuckles made with a link operating the same way as those at that time, excepting so far as the point of the link is concerned?

A. I have where the pelican-hook is bigger, coming further down on the stem of the turnbuckle?

Q. Can't you tell me what make that turnbuckle is?     A. No, I could not.

Q. You were in charge on that boat and you were working, going out of here, you say, for nine years, didn't you?     A. Five years out of Frisco.

Q. You have used turnbuckles during all of that period?

A. I couldn't tell you where that turnbuckle was made, because I didn't worry my head where it came from. It was on there when I went on.

Q. You would recognize the make of this turnbuckle when you saw one?

A. I would recognize the turnbuckle when I saw it, of course I would.

Q. You say you left this boat on November 23, 1916. Where did you leave it?

A. San Pedro.



(Deposition of Hugo Dallman.)

Q. Was that the end of the voyage?

A. That hasn't anything to do with it; I left the ship because it wasn't safe to remain any longer.

Q. What was the matter?

A. Fighting—the officers were fighting, and there was no protection, I never made a trip like that to sea before in my life, and I never want to make another one.

Mr. WALL.—I want to object to this as not proper cross-examination, as to whether or not it was the end of the voyage; as I understand it, there is a cause now pending in this court in which the court will have to determine whether or not it was the end of the voyage.

Mr. FORD.—Q. As to whether he deserted or did not desert? A. I did not desert. [73]

Mr. WALL.—I object to the remark of counsel; there is no such thing as a desertion of a seaman in an American port, a port of the United States.

Mr. FORD.—What do you call it when a man leaves a ship?

A. What do you call it when a man wants to be paid off? Do you call it desertion? Do you think a man would desert and leave \$120 on a ship? It is ridiculous to talk about such a thing.

Q. Don't give me any of that here.

A. I don't see what that has got to do with the trouble here, why I left the ship.

Q. We will show you what it has got to do with it? Now, you were the boatswain there in charge of these men?

(Deposition of Hugo Dallman.)

A. Yes, I was in charge of these men.

Q. You say you put this nail in yourself?

A. I put the nail in myself.

Q. You say you knew it was not a proper appliance?     A. Of course I did.

Q. You knew that you were leaving this man in a situation of danger; didn't you?

A. Well, I don't see how you mean that; I had to do as I got told; I am not responsible.

Q. You are not responsible?

A. When I am boatswain of the ship and the mate says, "You do that," that is the way it is done.

Q. Whoever told you how to adjust that turnbuckle, anybody?

A. Who told me how to adjust it?

Q. You knew how to handle a turnbuckle, didn't you, without anybody telling you?

A. Of course I did.

Q. What is the use in your saying that you knew it was not a proper appliance? You would not have put that man up against a situation of that kind if you had known it was dangerous, would you?

Mr. WALL.—I object to that as not proper cross-examination, as the witness has said he was boatswain on the ship and he had [74] to obey the orders of the first officer.

Mr. FORD.—I thought we did not have to make objections except as to the form of the question.

Mr. WALL.—You can make them whenever you want to.

Mr. FORD.—You are putting them in now in

(Deposition of Hugo Dallman.)

order to show the witness how he should answer, so I object to your making objections here which would indicate to the witness what he should say.

Mr. WALL.—The objection simply comprised what the witness has already said.

Mr. FORD.—I understand that, Mr. Wall, but you ought not, when you have got an intelligent witness like this man, to make suggestive objections to him.

Mr. WALL.—I don't know how I can object to it as not proper cross-examination except by stating the grounds.

Mr. FORD.—The point of it is our stipulation has reserved the objections, and I have got an adverse witness here, and by your making these objections and pointing out to him what he should say it may influence him.

Mr. WALL.—I can put my objections in now or I can put them in when the case comes to trial.

Mr. FORD.—The witness has shown from his manner already that he is hostile.

Mr. WALL.—I do not think so.

Mr. FORD.—Q. Mr. Dallman, you are not working for the same people now?     A. No, I know that.

Q. Grace & Company?

A. No, I ain't working for them.

Q. Have you any feeling against Grace & Company?

A. I have got no feeling; the only one I got feeling against is the captain, because he didn't pay my wages, that I had coming.

Q. You say you have some suit pending against

(Deposition of Hugo Dallman.)

the company now [75] for wages?

A. I have a suit against the captain.

Q. Against the captain; so you feel hostile toward the captain?

A. No, I sailed with the captain for two years before I shipped in the "Colusa," and we were the best of friends; he offered me the job; I have got nothing against the captain, but I want to get my money. I will ship with him again if he goes with another company.

Q. Why wouldn't you ship with him in this company?

A. I don't like this run; it is too long ways.

Q. You answer me fairly; you are bright; you do not like this company, do you? You are hostile?

A. I have nothing against the company; I don't like the run.

Q. What did you mean a while ago by the answer you made just before that?

A. Because I don't want to go on that South American run again; I had enough of it.

Q. This company runs ships other places, doesn't it? Grace & Company run a great many ships, don't they?

A. They run to Australia; I am a German and I can't go to Australia.

Q. Where do you live,

A. I live at the Palmer Hotel.

Q. In San Francisco?     A. Yes.

Q. Where is your home—where do your father and mother live, or your relatives?     A. Germany.



(Deposition of Hugo Dallman.)

Q. Where in Germany?     A. In Hamburg.

Q. Where is your home?   Have you any regular place that you live?

A. I have got relatives here in 'Frisco, if you would like to know that.

Q. Where is that?

A. They live on Sixteenth Avenue.

Q. What number?     A. 466.

Q. Do you expect to leave San Francisco?

A. No.

Q. How long do you expect to remain here?

A. I expect to take out my license pretty soon; I don't have to remain here forever. [76]

Q. You expect to take out your license pretty soon?     A. Yes.

Q. How long will that keep you here?

A. I will get my citizen's papers in four or five months; it will take me at least three or four months to go to school.

Q. You will be here for seven or eight months?

A. I will not leave for the next year.

Q. You will be here for the next year?

A. I might take a ship again, go to sea, you know.

Q. What I was getting at is, so that I could get information of how to locate you in case this matter could come on for trial. I would like very much to have you as a witness in court and have you explain that turnbuckle to the court.

A. If you have got no objection, I can go with you now and explain to you about the turnbuckle.

Q. What size nail was this you put in this eye?

(Deposition of Hugo Dallman.)

A. About that size.

Mr. WALL.—Q. About how many inches?

A. About four inches.

Mr. FORD.—Q. Do you know about tenpenny nails, and so on, the size?

A. This is a galvanized nail; that is all I know.

Q. What they call a wire nail?

A. Yes, about that thick.

Q. The nail was about a quarter of an inch thick, and this hole was about three-eighths of an inch?

A. Yes.

Q. Why didn't you get a nail the same size as the hole?

A. I couldn't get it; I sent the boy to the carpenter to get some nails for the turnbuckle, and these were the nails he brought back.

Q. Why didn't you send him back for another one? There were nails there of the proper size, weren't there?

A. I don't know whether there were or not; the carpenter knew all about it.

Q. Didn't you use nails the proper size in these holes?

A. We always used those nails; the carpenter always gave us those nails. [77]

Q. Those are the kind you used all the time?

A. That was the kind.

Q. Were all the turnbuckles on that ship the same make?

A. Pretty near; I think there was a few different ones; there were two different brands.

(Deposition of Hugo Dallman.)

Q. There were two different brands? A. Yes.

Q. But were most of them the same make as this turnbuckle?

A. Yes, the big ones were all that make.

Q. Why did you say that you put in this particular nail? A. Because I put it in there.

Q. You remember it, do you?

A. Yes, I do remember it.

Q. The turnbuckle over at hatch No. 2, did you put the nail through there, when you went over to No. 2?

A. I always done that; I had the nails in my pocket, and after we got the turnbuckle on I put the nail in, and I told them to set them tight afterwards, and we went to the next one.

Q. You always put in the nail yourself at each place?

A. I always done that, every time; I had the nails in my pocket and put them in.

Q. You always used the same sized nail?

A. Yes.

Q. You used that same sized nail this time?

A. Yes.

Q. Was it a new nail or an old one?

A. They were new nails.

Q. When you got back there, did you see what had happened to the turnbuckle?

A. No, I didn't see how it happened.

Q. It was still there when you got back?

A. No, it was carried away, and the turnbuckle was laying down in No. 1 hatch, and this man was down there.

(Deposition of Hugo Dallman.)

Q. That is what I say, the turnbuckle was still there?

A. One end was carried away, and the other end dropped in No. 1 hatch. [78]

Q. Which end carried away?

A. The port chain.

Q. Did the chain that was fastened to the end of the pellican hook carry away?

A. The pellican hook carried away.

Q. You did not see it, though?

A. No, I didn't see how it happened.

Q. Now, then, you answered Mr. Wall that at the time you were fastening this turnbuckle to the chain that the first mate, I think it was, or first officer, whatever you call him, was lifting the anchor, or something of that kind?

A. Yes, lifting the anchor.

Q. Where was he when this accident happened, if you know?

A. The first thing I saw, I heard the man holler, "Go and get this man up," and the mate was standing on the after-part of the forecastle and jumped on the deckload, and came over the forecastle-head.

Q. Who was the man that called you to go and get this man up?

A. The mate, but he was on the forecastle-head when he called.

Q. But you didn't know there had been an accident, did you?

A. No, I didn't know before I saw it.

Q. These other sailors that were with you, were



(Deposition of Hugo Dallman.)

they in the same location?

A. Yes, none of them saw it; they had their backs to it pulling on the tackle.

Q. So that the first thing you knew that Mr. Dunwoody had met with an accident was when the first mate called you?     A. Yes.

Q. Do you know a sailor named Pfautsch?

A. Yes, I do.

Q. Was he up there when the accident happened?

A. He was on the next chain with me, just putting the chain on.

Q. He was in the same situation as you were, then, so far as seeing the accident is concerned?

A. Yes, I don't think he saw it.

Q. He was not where he could have seen it?

A. I couldn't make any statement whether he seen it or not; I don't know.     [79]

Q. Could you have seen it?

A. If I would have turned the other way I would have seen it, but I had my back turned toward it.

Q. Which way did this man Pfautsch have his back?     A. I could not tell.

Q. You don't know whether he was looking or not?

A. There were six men; I couldn't tell how they stood.

Q. Would you say whether Pfautsch was over there with Mr. Dunwoody, or not, at the time the accident happened?

A. No, I couldn't tell you that, either.

Q. You couldn't tell that either?

A. I couldn't tell you exactly where Pfautsch was.

(Deposition of Hugo Dallman.)

Q. Didn't you say a while ago he was there with you?

A. He was there with me, but what he was doing, then, I don't remember.

Q. Would you say he was over with Dunwoody at the time, or not?

A. When I saw Dunwoody he was lying down in the hold; that is all I saw; I don't remember small things like that.

Q. Do you remember that Pfautsch was there with you?

A. I remember that he was there; he was working with me; that is what I remember.

Q. You spoke about these split pins that there should have been for this hook. Did you have any split pins for use in that type of hook?

A. No, because all the other turnbuckles I saw you don't need any nail at all; it would be safe without the nail, because they had an upward slant.

Q. But you have seen others of this particular kind of turnbuckle, others of that make-up?

A. I never worked with a turnbuckle with such a downward slant, and I never saw any other; that is the first time I put on a turnbuckle like that; I remember saying, "This ain't going to hold much." It kept on slipping all the time we put them on.

Q. You took no measures to correct that?

A. There was nothing [80] to be done. The only thing to do is to throw them in the bay and get new ones.

Mr. WALL.—I would like to ask Mr. Ford if he

(Deposition of Hugo Dallman.)

is going to produce the turnbuckle at this hearing.

Mr. FORD.—I was going to ask that the matter be continued because I wanted to get the turnbuckle and have this man identify it and mark it so that in case he is not here it will be identified.

Mr. WALL.—Could you get it this afternoon?

Mr. FORD.—I am satisfied I could not.

A. I couldn't come to-morrow; I have got to make a living; I have got to work.

Mr. FORD.—Q. Where are you working?

A. I am working at the Union Iron Works.

Q. You have a position at the Union Iron Works?

A. If I keep it; if I come back here I will be fired. I don't know how long that will be. If I get a job I will go to sea again.

Q. The turnbuckles on the boat of that make were all alike?

A. Yes, they were all alike. I guess they brought them out from England when the ship came out.

#### Redirect Examination.

Mr. WALL.—Q. You spoke of the deck lashing having carried away; all you meant was that the pelican hook opened out and the upper deck lashing slipped off the pelican hook? A. That is it.

Q. Now, then, you have taken out your intention papers to become an American citizen, have you?

A. Yes.

Q. And expect to come up for an examination as a licensed officer of merchant vessels of the United States? A. Yes.

Q. As a seafaring man, your home is in San Fran-

(Deposition of Hugo Dallman.)

cisco; that is, this is your home port?

A. I call it my home.

Q. Have you been going to sea out of here for the last five years? [81]

A. Not quite; four years and six months.

Q. You expect, after you get your license, to continue going to sea as a licensed officer?     A. Yes.

Recross-examination.

Mr. FORD.—Q. Mr. Dallman, when you said the pelican hook opened up, you did not see it open up, did you?     A. I did not see it.

Q. You are only just stating your conclusion, aren't you?

A. Do you think anybody is going to open the hook and take the chance of loosing the deckload, putting the ship in danger?

Q. I am asking you whether you saw it or not.

A. I saw lots of them open up.

Q. Your answer to Mr. Wall would indicate that you saw this particular pelican hook open up which caused this accident. Now, as I understand it, you did not see it at all.     A. Which?

Mr. WALL.—I admit that is the witness' conclusion. It was only for the purpose of showing what he meant by his other conclusion, that it carried away; that is, he did not mean as a conclusion that any lashing broke, but what he meant by "carried away" was the conclusion that it had slipped off.

Mr. FORD.—Now, Mr. Wall, I will arrange, if we want Mr. Dallman's testimony further, if we conclude that there is danger of his not being here, to



(Deposition of Hugo Dallman.)

have him identify one of these turnbuckles—I will arrange to get him down here.

Mr. WALL.—Request is also made to produce the turnbuckle before the trial for identification. At this time I want the record to show that I request that Mr. Ford produce it at the trial.

Mr. FORD.—You say all the other makes had this link fitted through another link ?

A. Not all of them; but I saw some made that way. [82]

United States of America,  
State and Northern District of California,  
City and County of San Francisco,—ss.

**Certificate of United States Commissioner.**

I certify that, in pursuance of stipulation of counsel, on Friday, December 29, 1913, before me, Thomas E. Hayden, a United States Commissioner for the Northern District of California, at San Francisco, at the office of F. R. Wall, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared Hugo Dallman, a witness called on behalf of the libelant in the cause entitled in the caption hereof; and F. R. Wall, Esq., appeared as proctor for the Libelant, and George K. Ford, Esq., appeared as proctor for the Respondent; and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition of the witness and the signing thereof was expressly waived.

Accompanying said deposition and referred to and specified therein is “Libelant’s Exhibit 1, Dallman.”

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken. [83]

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set  
my hand in my office aforesaid this 15 day of March,  
1917.

[Seal]                      THOMAS E. HAYDEN,  
United States Commissioner, Northern District of  
California, at San Francisco.

(Attached hereto is “Libelant’s Ex. 1, Dallman.”)

[Endorsed]: Filed Mar. 16, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [84]

*In the United States District Court for the Southern  
Division of the Northern District of California,  
First Division.*

IN ADMIRALTY—(No. 16,129).

Before: Hon. MAURICE T. DOOLING, Judge.  
GEORGE I. DUNWOODY,

Libelant,

vs.

American Steamer "COLUSA,"

Respondent.

**(Testimony Taken in Open Court.)**

Friday, March 16, 1917.

Counsel Appearing:

For the Libelant:

F. R. WALL, Esq.

For the Respondent:

GEORGE K. FORD, Esq.

(The above matter coming on regularly for trial,  
the following proceedings were had.)

**Testimony of L. L. Williams, for Libelant.**

L. L. WILLIAMS, called for the libelant, sworn.

Mr. WALL.—Q. What is your profession?

A. Surgeon.

Q. How long have you been such

A. Since 1885.

Q. Do you hold any government position, Doctor?

A. Yes, senior surgeon, United States Public  
Health Service.

Mr. FORD.—Mr. Wall, you need not bother about

(Testimony of L. L. Williams.)

laying any foundation, we admit the qualification of the doctor. [85]

Mr. WALL.—Q. Doctor, you are in charge of the Marine Hospital in San Francisco? A. Yes, sir.

Q. Do you remember Mr. Dunwoody, here, having been admitted to the hospital about the 28th of November, last?

A. On the 28th of November, yes.

Q. Do you remember when he was discharged, Doctor? A. The 15th of December.

Q. Doctor, will you please state to the Court what you did in regard to Dunwoody when he was admitted, what examinations you made and what was found, and what you done for him?

A. He stated that he wished his statement of previous injury—do you mean just what I found?

The COURT.—Q. Just what you found, Doctor.

A. He complained of pain and disability in the left wrist; the movements were limited, quite limited, and the joint rather swollen, and tender on pressure. On examination I found a projecting piece of bone right in front of the wrist, about in this locality. I then submitted him to an X-ray examination, which disclosed the presence of an old fracture, what is known as a Colle's fracture, that is, a fracture of the larger bone of the forearm, just above the wrist joint. The X-ray showed that a part of the lower fragment was projecting forward, that is, it was not in complete alignment. The fracture being united in that position, it was impossible to say whether the lower fragment had tilted or whether this was a sep-



(Testimony of L. L. Williams.)

arate piece of bone, a small, comminuted portion which had not got into line with the rest. The fracture having occurred about two months previously, it seemed possible that it might be refractured so as to permit a little better alignment. The projecting piece was interfering with the action of the tendons moving the wrist joint. So about two [86] or three days after his admission he was etherized and an attempt made to rebreak it. It was found to be too firm for such an operation and that was abandoned. So, several days later, he was again etherized, and an open operation was done, and the projecting portion of the bone was chiseled away so as to permit free use of the tendon. That wound healed in about a week or ten days, and he proceeded to improve, and at the time of his discharge on the 15th he was free from pain, and the wrist joint movement was very much improved. I discharged him with instruction to continue using it from that time quite freely, and probably the movement of the joint would become better. I have not, to my recollection, seen him since.

Mr. WALL.—Q. Doctor, was there any fracture of the other bone?     A. No, sir.

Q. It was simply of the larger bone?

A. The larger bone.

Q. Was anything done to reduce the enlargement?

A. You mean at the time that I saw him?

Q. While he was in the hospital?

A. Oh, yes, I just stated that I attempted to rebreak it, but that failed; it was too firmly united to

(Testimony of L. L. Williams.)

break it by any force, so that the only thing to do was to cut away the portion that was interfering with the tendon controlling the action of the wrist joint.

Q. Will you tell what effect that had upon his having free and full use of that left hand and arm?

A. You mean prior?

Q. No, afterwards, when he was discharged.

A. It is a little difficult to say, because it is a matter of the experience of individual patients as to just how much motion he gets after a fracture of that character.

The COURT.—Q. Doctor, he was discharged in December. A. Yes, sir. [87]

Q. He is now present in court; you might examine his wrist now. A. Yes, I will.

Mr. FORD.—Is it all right for me to observe the examination, your Honor?

The COURT.—Oh, yes.

A. He has not complete use of the wrist joint. As you will see with my own, it bends that far. That is apparently the limit of the motion. In that direction it is somewhat limited, but not so much. That motion is distinctly limited. Then the effect of that fracture is to shorten up that bone a little bit. You will notice that the hand is thrown in that direction as compared with the other; that also affects the usefulness to some extent. That is unavoidable in all these fractures, no matter what the treatment is, as a rule. These are difficult fractures to treat at best. They frequently run into the joint. Just

(Testimony of L. L. Williams.)

how much function you get afterwards is problematic. In those that are quite simple and are reduced immediately, you usually get a pretty fair result. It is rather the rule that there is some limitation of the action of the joint afterwards, and some weakness of the hand.

Mr. WALL.—Q. Doctor, what would you say, if anything, as to the horizontal movement of the hand?

A. Well, that is pretty fair. I don't think there is much, if any, limitation in that.

Mr. FORD.—Before the libelant takes his seat, I would like him to exhibit both wrists to the doctor, so that the Court can see them both.

A. It is very apparent, I think, to anyone. Just turn your hand over. The turning of the hand on that side is a permanent condition. You see, there is very little difference in the lateral motion; there is that much difference between them in the forward motion of the hand. In the back motion there is not much, if any, difference. [88]

Mr. WALL.—You may cross-examine.

Cross-examination.

Mr. FORD.—Q. Doctor, you made a report to Mr. Wall under date of January 30th of your examination in this case and your treatment.

A. I think so; Mr. Wall wrote me, at the instance of the libelant, requesting a statement.

Q. When you discharged Mr. Dunwoody on the 15th of December, so far as medical attention was

(Testimony of L. L. Williams.)

concerned, he had had all the medical attention he required, had he?

Mr. WALL.—We don't make any question about that.

Mr. FORD.—Q. What about the result, so far as you are concerned, of your treatment, did you get as good a result as you expected?

A. As good as I had any reason to expect.

Q. Now, as I understand it, Doctor, in one of these Collie's fractures, the surgeon setting the fracture is not able to place the bone in apposition, as if it were further up, so as to get the bone in exact position; you have to rely on its setting, do you?

A. We have to do the best we can. It is not always possible to reduce a fracture, I am very sorry to say.

Q. The surgeon who had set the fracture originally probably did all that could be done, from what you observed?

A. I have no reason to think the contrary.

The COURT.—There is no charge of malpractice, is there, or of improper treatment?

Mr. WALL.—Nothing of the kind. There is no contention here that he did not receive proper medical care or treatment, or that he did not receive proper hospital attention, or that any claim is made for hospital charges, or anything of that kind.

Mr. FORD.—I simply want to show your Honor that the defendant had secured medical attention for this man. [89]

The COURT.—It is admitted.



Mr. WALL.—We admit that; we never set up anything to the contrary.

Mr. FORD.—That is all.

**Testimony of George I. Dunwoody, in His Own  
Behalf.**

GEORGE I. DUNWOODY, libelant, sworn.

Mr. WALL.—Q. Give the reporter your full name.

A. George I. Dunwoody.

Q. You are the person who has brought this suit for your damages? A. Yes.

Q. What is your business, what do you do for a living? A. Seaman.

Q. How long have you been following the sea?

A. I should say about seven years.

Q. How old are you now? A. 24.

Q. Up to November of last year, what branch of the sea were you following, that is, were you in the merchant service, or the government service, or what? A. In the merchant service.

Q. Where were you in September of last year?

A. I was aboard the "Colusa."

Q. In what capacity were you serving on board of her? A. Seaman.

Q. What wages were you getting?

A. \$55 a month.

Q. Board and lodging? A. Yes.

Q. Aside from your wages, state what, if anything, you generally earned, and how you earned it.

A. They were paying 25 cents an hour overtime on that ship; it averaged about 75 to 80 hours on the

(Testimony of George I. Dunwoody.)

voyage, a two-months' voyage.

Q. And on the other ships, what overtime would you generally average?

A. On other ships you would average about \$20 a month, ships in the coast service? [90]

Q. Whereabouts on this ship were you working on the day you got hurt, on the "Colusa?"

A. On the port side of No. 1 hatch, on the deck-load.

Q. On top of the deckload? A. Yes, sir.

Q. Where was that No. 1 hatch with reference to the foremast?

A. It is right after of the foremast.

Q. What were you doing up there?

A. I was setting up the turnbuckle.

Q. Now, go ahead and tell the court everything that happened to you, what you were doing and what happened to you.

A. Well, while they were pulling these chains together with a tackle I was down getting a stillson wrench; when I came back with the stillson wrench they had the two chains pulled together at that time.

Q. Just tell the court how those chains were rigged, and what there was in between the two ends amidships, or where you were?

A. There was a turnbuckle.

Q. How did the deck lashing fasten on the star-board side of the "Colusa" to the "Colusa's" deck? How was the deck lashing fastened to the deck?

A. It is shackled into a ring bolt.

(Testimony of George I. Dunwoody.)

Q. And from there how did it get into the deck-load?

A. It came straight up and over the deckload.

Q. And the same way from the port side?

A. Yes, sir.

Q. What was in between the two inboard ends of the deck lashing?

A. This turnbuckle, with a pelican hook in it.

Q. Just describe to the court what that turnbuckle and pelican hook were like?

Mr. WALL.—I will show your Honor this photograph. It may help you some. [91]

The COURT.—We can get a better idea of it if this is a correct representation—from this photograph.

Mr. WALL.—That is like it in a general way.

Mr. FORD.—I attempted to get a turnbuckle and get it in here to-day. I don't know whether I can produce one, or not.

Mr. WALL.—Q. I show you that picture, Fig. 7, which shows two views of a turnbuckle. How much of the turnbuckle that was in use was in its general nature like that? Just examine that and see it. There are one or two sketches in the other testimony that show the appearance of the turnbuckle.

A. It was the same kind of a turnbuckle—the same kind of pelican hook, only this hook here was much shorter than that; the hook came within about three inches of the end of the link, here.

Q. The pelican hook was much larger than this, the hook came to within only about three inches of

(Testimony of George I. Dunwoody.)

the end of the link?     A. Yes, sir.

Q. Did it have a ring that fits over the top of it?

A. The pelican hook was in the turnbuckle just like that.

Q. And did it have a ring over the pelican hook?

Mr. FORD.—While I have not seen this turnbuckle, I understand that the figure is not a good illustration at all of the one in question.

Mr. WALL.—You say it is not?

Mr. FORD.—No, I understand not.

Mr. WALL.—You folks have the turnbuckle.

Mr. FORD.—Mr. Palmer has a picture of it that he drew. He is not any more of an admiralty lawyer than I am, and I don't know how well he did it.

Mr. WALL.—Q. How was the bottom of the pelican hook fastened to the rest of the hook?

A. It is in a link.

Q. When the ring is taken off the top of the pelican hook, would [92] the pelican hook drop down?

A. Yes, sir.

Q. Swiveling or piveting on this link?

A. Yes, sir.

Q. Over the top of the ring, what was there, if anything, that passed through the pelican hook?

A. A forelock or pin—a nail, in this case.

Q. A forelock, or nail?

A. A nail is what we used on that ship.

Q. Now go ahead and tell the court what you did and what happened to you?

A. After I came up on deck with this stillson wrench I asked the boatswain if he wanted me to go



(Testimony of George I. Dunwoody.)

and get a forelock; he said, "No," that "The deck boy has one"; he called him—Heine by name, I think—

The COURT.—Q. By the "forelock," you mean that pin? A. Yes, sir.

Mr. WALL.—Q. That nail.

A. The nail. I stood back until the boatswain finished connecting the pelican hook and the other chain together, the port chain; then he told me to go ahead and set it up so I just reached down and got the stillson wrench and started to setting it up.

Q. Do you know who put the nail in there?

A. Yes, sir, the boatswain did.

Q. Now go ahead.

A. As soon as they got the two chains together—

The COURT.—Q. By "setting it up," just what do you mean, turning that screw around?

A. Yes, sir.

Q. That tightens the lashings?

A. Yes, sir. You open the screws out as far as you can and then you screw them up.

Q. You didn't commence setting up until the pelican hook had already been set to the point placed by the boatswain? A. Yes, sir, everything was all connected when I started turning on the turnbuckle.

Mr. WALL.—Q. Now, go ahead from that point.

A. As soon as he [93] told me to set it up, all the men left and went forward of the No. 2 hatch to set up the rest of the lashing. I sat down on the edge of the deckload and started to setting it up—

The COURT.—Q. The ends of the lashing came

(Testimony of George I. Dunwoody.)

together on the edge of the deckload?

A. Yes, sir, right on the edge of the deckload.

Mr. WALL.—Q. How far out did you have to reach from the edge of the deckload to set up the turnbuckle?

A. About two feet, I should say.

Q. All right, now go ahead from that point.

A. The next thing I was down in the hold, and I sung out and the mate asked me if I was hurt, and I told him I was; I told him I thought my leg was broken, and my arm; I told him I knew my arm was broken, and I said I thought my leg was broken. So he called the rest of the men over and they put a ladder down and one of the sailors helped me aft into the forecastle. I guess that was about seven o'clock in the morning. About eleven o'clock we arrived in Talara.

Q. What distance was it from the top of the deckload to where you fell?

A. I should say about fifteen feet.

Q. Who brought you up out of the hold, if you know?

A. The boatswain and one of the sailors.

Q. What injuries did you receive by your fall?

A. A broken arm and a sprained ankle.

Q. Tell the court fully what pain, if any, you suffered by reason of those injuries?

A. I suffered quite a lot with my ankle for about a week, or a week and a half; then I began getting pains in my arm. My ankle was hurting me worse at first than my arm. After my ankle got all right,

(Testimony of George I. Dunwoody.)

my arm began to bother me then.

Q. How long did that continue to pain you?

A. It continued for about four months afterward.

[94]

Q. State whether you still have any pain there, and if so what?

A. I have pains there when I bend my hand back and put any weight on it, like trying to lift myself up with the palm of my hand.

Q. What was the vessel doing at the time you got hurt, was she at anchor or under way?

A. She had just been under way I should say about two or three minutes; the anchor had just got up and they were securing it.

Q. Where had she been anchored just prior to the time you got hurt?      A. I got hurt in Paita.

Q. What sort of a roadstead or harbor was it where you were anchored?

A. It is an open roadstead.

Q. Open to the sea, do you mean?      A. Yes, sir.

Q. How far was she from shore where she was anchored, to the best of your judgment?

A. I should say about a mile and a half or two miles.

Q. Then, as I understand you to say, she had just got up anchor and starting to another port?

A. Yes, sir.

Q. And you went to that port, and there you were taken on shore and received medical treatment from some doctor there, is that correct?

A. I stayed at the captain of the port's house until

(Testimony of George I. Dunwoody.)

about six o'clock that night.

Q. Well, never mind about that, that is not material; we will get to the material parts of it. The vessel continued on her voyage, and finally got back to San Pedro? A. Yes, sir.

Q. And you left her at San Pedro and came up to San Francisco, did you not? A. Yes, sir.

Q. You got what they call a ticket from the shipping commissioner and went out to the Marine Hospital? A. Yes, sir.

Q. And received treatment there and left there on December 15th? A. Yes, sir.

Q. From December 15th how long did you remain on shore? [95]

A. I should say about five weeks, a little over five weeks, I believe it was.

Q. Why did you remain on shore?

A. I was not able to go to work.

Q. Why were you not able to go to work?

A. I didn't have no control of my hand, no strength in it.

Q. During the time you were on shore, what expenses were you at for your living?

A. Do you mean how much?

Q. How much did it cost you for your room and your meals?

A. I was paying \$2 a week for a room; it cost me about 85 cents to a dollar a day for eating.

Q. Did you have to pay for your laundry?

A. Yes, sir.

Q. What did that average a week?



(Testimony of George I. Dunwoody.)

A. That averaged about a dollar and a quarter a week.

Q. When you were able to go to sea, what did you do?     A. I went as a sailor.

Q. Where?     A. On the "Bear."

Q. That is in the Coast Guard Service?

A. Yes, sir.

Q. You enlisted on the "Bear?"     A. Yes, sir.

Q. For how long a time?     A. One year.

Q. What are your wages on the "Bear?"

A. \$44.40 a month.

Q. Why didn't you continue in the merchant service instead of enlisting on the "Bear?"

A. I didn't have strength enough to work in the merchant service; it is heavier work in the merchant service than it is in the government service.

Q. What did you have to pay for your clothing outfit when you joined the "Bear?"

A. You have to pay for all that you get; you have to have a regulation amount of clothes. They allow you a little time to get money enough to pay for that, though.

Q. What has the outfit cost you?

A. It has cost me a little [96] over \$30 so far, but I haven't got nearly all of my clothes yet.

Q. What is the fact as to whether your expenses for clothing while you are on the "Bear" will be greater or less than in the merchant service?

A. Greater.

Q. Can you make any estimate of what the difference will be?

(Testimony of George I. Dunwoody.)

A. Well, it will cost about \$30 in the year more in there than it would in the merchant service.

Cross-examination.

Mr. FORD.—Q. Mr. Dunwoody, this position you have on the "Bear" is in the government service, as I understand it. A. Yes, sir.

Q. Generally speaking, is that a better position than the one you had on the "Colusa," or not?

A. It is easier.

Q. And how about it among the sailors, would they consider that a better job, or the one on the "Colusa" a better job?

A. You don't get near as much money; it is easier but you don't get so much money.

Q. You don't have any overtime on the "Bear."

A. No, sir.

Q. You stated to Mr. Wall that you left the ship down at San Pedro.

A. Yes, sir, I did.

Q. You left of your own accord, did you?

A. No, sir, I was told to go ashore.

Q. You were told to go ashore?

A. Yes, sir, by the captain.

Q. And did he tell the other men to go ashore, too?

A. He told one man that I know of.

Q. All of you left there, didn't you?

A. Yes, but I only know about one other man and myself.

Q. So far as you were concerned, you did not leave of your own accord?

A. No, sir, I didn't want to leave, because I wanted

(Testimony of George I. Dunwoody.)

to come back here anyhow and I would be just the money out for my passage up.

Q. Then it is not true that you and all the other sailors left at San Pedro?     A. Yes, I left there.

[97]

Q. And didn't the others leave?     A. Yes.

Q. They left at the same time you did?

A. Yes, sir.

Q. And didn't you and they come up here together—some of them?     A. Yes, sir.

Q. With reference to setting up this turnbuckle, when you started with your stillson wrench to screw up the turnbuckle did you look to see whether or not the pin had been inserted in the pelican hook?

A. I did.

Q. And what did you see?     A. I saw a nail.

Q. What kind of a nail did you see?

A. A nail about three inches long, I should say, or two and a half inches.

Q. Do you know about the size of nails?

A. No, I don't know about the penny sizes, how they go.

Q. How was that nail as compared with nails you had usually seen used in the pelican hook, was it the same size nail as you had seen used all the time?

A. No, sir, it was smaller.

Q. Did you notice whether it was fastened in there in any way, or not?

A. There is no way to fasten it; you just put it in there. That is the way they always put them in in the ship before.

(Testimony of George I. Dunwoody.)

Q. You saw, though, that this nail was loose?

A. No, sir, I didn't see that it was loose.

Q. You say you saw that it was a small nail?

A. Yes, but some of those holes are larger in some of the pelican hooks.

Q. You made no examination to see whether it fitted snug, or not, did you? A. No.

Q. And you didn't notice whether it had been kinked, as if it had been hit by a hammer, or not?

A. No, sir, it could not have been; they would come right apart if you bent the nail.

Q. The ring is slipped over when you put the nail in, is it?

Q. Yes, sir, it is, but if you bend the nail the ring would slip over the end and the nail, too; it would have to be straight to [98] hold the link on there.

Q. The nail that is usually used in the pelican hook, what size nail do they usually use there? Would they stay in all right?

A. They always did before, except a couple of times that I know of that they slipped; but it was on a level deckload, there were no accidents, or anything; I have saw them slip a couple of times before that.

Q. While you were lashing up this deckload at the No. 1 hatch, who was with you there, if anyone, while you were working with the stillson wrench?

A. Nobody; I was there myself.

Q. Where was the first mate?

A. The first mate was just coming off the fore-castle-head; he was in the eyes of the ship when I first stooped down to pick up the stillson wrench, and



(Testimony of George I. Dunwoody.)

I raised up and I looked forward, and the first mate was just starting to walk aft.

Q. There was nobody there but yourself, then, when you started turning up this turnbuckle?

A. No, sir.

Q. The other men had gone back to another part of the deckload? A. No, sir.

Q. You don't know yourself what happened, do you? All you know is you went down into the hold?

A. Yes.

Q. How high was this deckload? How high did the lumber stand on the deck?

A. The lumber on the deck?

Q. Yes.

A. The lumber on the deck was about—I should say eight or ten feet, eight or nine feet.

Q. Eight or ten feet high? A. Yes, sir.

Q. Do you know how much of a load the ship had?

A. No, sir; it was right even with the forecastle-head.

Q. So you fell these eight or ten feet down, as far as the deck, and you fell whatever distance there was down into the hold? A. Yes, sir. [99]

Q. How far below the hatch was the load in the hold? A. About six or seven feet.

Q. Who told you and the other men there to lash this load of lumber up?

A. The boatswain gave me orders to set up the turnbuckle.

Q. He is the one who told you to do it?

A. Yes, sir.

(Testimony of George I. Dunwoody.)

Q. That is, when you came back there with the stillson wrench, he had put the nail in himself?

A. Yes, sir.

Q. You saw him put it in?

A. I saw him put it in.

Q. You stood there and saw him put it in?

A. Yes, sir; I was standing right near him, right behind him.

Q. And he told you to set up the turnbuckle?

A. Yes, sir.

Q. And he and the other men went away?

A. Yes, sir.

Mr. WALL.—That is the libelant's case.

The COURT.—That, with the depositions.

Mr. WALL.—With the depositions, your Honor.

Mr. FORD.—Now, your Honor, as to the depositions—as to the deposition of the one I mentioned first, Carl Pfautsch, there is no objection to that deposition. As to the deposition of Dallman, which was taken on the 29th of December, 1916, we do object to its use for the following reasons: First, that there is no showing made that the witness is absent from the jurisdiction of this court; second, that it appears from the face of the deposition, from the conversation between counsel, that it was expected that this particular witness would be produced personally if he was not at sea at the time the trial came on. I have not had an opportunity personally to look over the deposition, but my recollection is very clear on the matter that on cross-examination I pointed out to the witness and

(Testimony of George I. Dunwoody.)

to Mr. Wall both that as [100] to this particular witness we desired him in court. I presume there is no dispute between Mr. Wall and myself but that the witness is in town to-day.

Mr. WALL.—I don't know whether he is in town, or not; I don't think it makes any difference. There was a stipulation that this testimony, when written out, may be read in evidence by either party at the trial. It appears from the deposition that if the witness was wanted by Mr. Ford that Mr. Ford would produce him; and Mr. Ford had ample opportunity to produce him, if, as he says, he knows he is in town. He cannot make the objection at this time. If he knew he was in town, and he knew he was going to make this objection, he should have made it before; he cannot make that objection at this time. The libelant is suing as a pauper. He has gone to the expense—at least his counsel has for him—to take that testimony. There is no presumption that if the man was produced here he would swear otherwise than he has sworn; in fact, all the presumptions are to the contrary. If counsel on the other side thought he would do it, he should have produced him here for cross-examination. There is no reason at this time why we should be met with an objection of this character; it is unusual and unheard of.

The COURT.—The objection is overruled.

Mr. FORD.—I want to say, Mr. Wall, that I did not know that Mr. Dallman was in town until nine o'clock this morning.

(Testimony of George I. Dunwoody.)

Mr. WALL.—And Mr. Dallman told you in his deposition where he was working, and that he expected to continue working there.

Mr. FORD.—I just got from the reporter this morning this testimony. I expected to have the testimony written up before and then I could have gotten the addresses of these witnesses; I presume it was my fault that it was not written up. [101]

The COURT.—Any testimony on the part of the respondent, other than the depositions?

Mr. FORD.—Oh, certainly, your Honor.

The COURT.—Let us have it.

Mr. FORD.—We offer in evidence the deposition of John Bergstrom, the first mate of the steamship "Colusa." I had assumed that the depositions would be read, and, therefore, I am not prepared with my witnesses; I expect to have them here this afternoon.

The COURT.—There will not be any witnesses this afternoon; the case was set for to-day and was to be tried in half a day.

Mr. FORD.—I didn't know that. It is a case that will take all day. I didn't know anything about its going to be half a day case; it will take me more than half a day to put in our testimony.

The COURT.—Well, it will take you a week unless you commence.

Mr. FORD.—We offer this deposition in evidence.

The COURT.—Very well, the deposition is in evidence.



(Testimony of J. Cribbin.)

Mr. FORD.—I will not quarrel about the other deposition matter; as I have said, I am a stranger in this court, and in admiralty matters; I will know better the next time.

**Testimony of J. Cribbin, for Respondent.**

J. CRIBBIN, called for the respondent, sworn.

Mr. FORD.—Q. Where do you reside?

A. 228 Brannon.

Q. What is your business or occupation?

A. Supercargo, W. R. Grace & Co.

Q. How long have you been connected with W. R. Grace & Co.?

A. I have been connected with them now for two years.

Q. Are you acquainted with the steamship “Colusa”?

A. I am.

Q. And the appliances used on the ship?

A. I am.

Q. Have you had occasion to use them?

A. I have. [102]

Q. Do you know the type of turnbuckle used there?

A. I do.

Q. Will you state to the Court whether that is a standard make?

A. It is a standard make, the same as any other ship has.

Q. Do you recall the type of turnbuckle that has a point that goes through the end of the pelican hook to keep the link from slipping off?

A. Yes, sir.

(Testimony of J. Cribbin.)

Q. How is that particular appliance, as to whether it is standard?

A. Well, there are some of them made that way, and some—

Mr. WALL.—I object, that there is no proper foundation laid that this man is an expert.

Mr. FORD.—I will lay the foundation.

Q. You have stated what your business is; do you have occasion to use, in your business turnbuckles?

A. Sure, on deckloads, to lash the deckloads.

Q. To what extent have you had experience with turnbuckles?     A. On every ship.

Q. For how long a period of time have you been using them?

A. Well, I have had that experience for over two years, on every ship.

Q. On every ship?

A. On every ship that we handle.

Q. How many ships do you handle?

A. A year?

Q. Yes, say in a year.

A. Well, it all depends on the trade; take, for instance, last year we had fourteen ships running; this year we only have six on this coast.

Q. And you are using the turnbuckles on those ships all the time?

A. All the time when they are coming south.

Q. Will you describe to the Court the different types of turnbuckle that are used, if there is more than one type?

(Testimony of J. Cribbin.)

Mr. WALL.—I object to that as immaterial; the only question is what type was used here. [103]

Mr. FORD.—Your Honor will see when you read the deposition—

The COURT.—Let us have the testimony.

A. This turnbuckle that the “Colusa” has is a turnbuckle—and there is another turnbuckle that kind of has the hook on it that is beveled, that will fit on the rod; this “Colusa” is more of a straight hook; that is the one that has the pin in it.

Q. The turnbuckles that are beveled, do they have a pin? A. No, they don’t have any pin.

Q. Which of the two turnbuckles would be the least likely to slip?

A. I never found any of them to slip; in fact, when we let go the lashings, which we always have occasion to do when they come down from Puget Sound, the lashings are always across the hatch, where the hatch is open, we always have to hit that link and loosen it.

Q. That is, in your experience with this particular class of turnbuckle, the link will stay there until you knock it off?

A. Yes, with a block of wood, or something; it never slipped off with us. We always have to hit it to get it off.

Q. In the last two years how many occasions have you had, or the men under you, to use a turnbuckle in lashing up the deck?

A. That is pretty hard to say. Every ship that

(Testimony of J. Cribbin.)

comes down from Puget Sound that we handle and that is going to South America, we have to do the same thing.

Q. What is used as a pin to go over that hole in the turnbuckle, usually?

A. We don't use the pin. We tie it up with what we call a rope yarn, or a small marline we tie that up with a rope marline—that is a small piece of rope; we never use a pin in there; in fact, the only thing that could be used would be a nail.

Q. Do you know what size nail?

A. A three-inch nail. [104]

Cross-examination.

Mr. WALL.—Q. You say you are supercargo?

A. Yes, sir.

Q. That is to say, you have the regular duties of a supercargo on board ship; you act as a purser now, do you?

A. No, I have charge of loading; I don't travel with the ship.

Q. Is not a supercargo a person that goes on board the ship and acts as a purser?

A. That is what the dictionary defines it as, they travel with the ship.

Q. Your duties correspond with those of a purser?

A. I superintend the loading of the ship. I am titled as a supercargo. I do not travel with the ship.

Q. How many different types of turnbuckles were on the "Colusa" on this voyage, if you know?

A. One that I know of.



(Testimony of J. Cribbin.)

Q. Do you know that there was more than one?

A. I would not swear there was more than one, but there was one that I know of.

Q. You would not swear there was more than one; there might have been more than one?

A. As far as I can recollect there was only that kind on there; that is the only kind I have seen on there.

Q. So far as you personally know there might have been more than one?

A. There might have been one or two of the other type; that I would not swear to.

Q. And your method of securing a turnbuckle is to tie it up with a rope marline, or rope yarn, or something of that nature?

A. Yes, and we never find any that will slip off; we have to knock them off.

Mr. WALL.—I move that the latter part of the answer be stricken out as not responsive to the question.

The COURT.—Well, he has only repeated it. It may go out.

Q. When it does slip off there is something the matter with it then?

A. Yes, your Honor, but we never found it to slip off. [105]

Q. I know, but I say, if it does slip off, it is because there is something wrong with it. A. Oh, yes.

**Testimony of Harry Stremmel, for Respondent.**

HARRY STREMMEL, called for the respondent, sworn.

Mr. FORD.—Q. Where do you reside Mr. Stremmel? A. 1148 Church street, San Francisco.

Q. What is your business or occupation?

A. Foreman for the California Stevedoring & Ballast Company.

Q. In your work as foreman for the stevedoring company, have you had occasion to do any work in connection with the steamship "Colusa"?

A. Yes, sir.

Q. Do you know the type of turnbuckles used on the "Colusa"? A. Yes, sir, I do.

Q. The type of turnbuckle that has a pelican hook that the link slips through and then a pin goes through the end of the hook?

A. Well, I am not sure about the pin; I have loaded and discharged the "Colusa" this last year four or five different times.

Q. What did you find with reference to the turnbuckles and appliances on the "Colusa"—I will withdraw that. How long have you been working in this line of business?

A. I have been with the California Stevedoring & Ballast Company for a year and a half this time.

Q. And what were you doing before that?

A. I went to sea.

Q. Were you ever a sailor?

A. I have been a sailor, yes.

(Testimony of Harry Stremmel.)

Q. And then you went up, I presume, further in the occupation?     A. Yes, sir, I did.

Q. What was your business when you were last at sea?

A. I was chief officer of the steamship "Northern Pacific." [106]

Q. For about how many years have you had to do with ships?     A. 19 years.

Q. From your observation of the appliances on the "Colusa," can you state whether or not they are standard, particularly with reference to the type of turnbuckle used there?

A. Well, in my judgment they are standard.

Q. Is there more than one type of turnbuckle used on ships?

A. Well, there may be; they are not all exactly alike. There may be minor little differences in the construction of a turnbuckle.

Q. Do you recall that you used any of this type of turnbuckle that has a hole through the end for the pin that the link slips over so as to hold the link from slipping off?

A. I cannot remember whether I ever saw a hole in the end of the pin.

Q. The ones you saw, you never remember of seeing that hole used at all; is that the idea?

A. No.

Q. What holds the link on?

A. The strain on the turnbuckle holds the link on.

Q. As I understand you, then, when the turnbuckle

(Testimony of Harry Stremmel.)

is screwed up and the strain comes onto the pelican hook, it, of itself, holds the link on?

A. The more strain you get on the chain, on the turnbuckle, the tighter the ring is on.

Q. How is the link kept on until you get the strain on the turnbuckle?

A. It is slipped on and then the turnbuckle is set up.

Q. What is there to prevent its slipping off while you are setting up the turnbuckle?

A. Nothing at all.

Q. How about the man who is turning it up, can he see if it is slipping off?

A. Yes, if he is watching the ring he can see if it is slipping, I suppose.

Q. In your experience, have you ever seen a ring slip off the pelican hook of a turnbuckle?

A. No, I never seen one slip off, unless it is knocked off. [107]

Q. You say in the last year you have worked on the "Colusa" four or five times?

A. In 1916, yes, sir.

Q. And during that time you say you used the turnbuckles?

A. Yes, I have had men set up the turnbuckles. Whenever a ship came into port to load or discharge cargo, as a rule we have to let go the deck lashings that were leading across the hatch, so that we could work, and then after the ship was loaded we had to set up the turnbuckle again.



(Testimony of Harry Stremmel.)

Q. The man who is screwing up the turnbuckle so as to bring the load up tight, what would be the situation so far as he is concerned, as to whether it is necessary to pay any attention to the link, to see whether it does slip, or not?

A. Well, my men never pay any attention to it so far as I know, but just slip the ring back as far as we can, and then set up the screw to tighten up the chain.

Q. Would this link and the pelican hook be in your view while you are tightening up?

A. Oh, yes. As a rule we have—Well, we put in a stick to keep the chain from turning, and then a man takes an iron rod to go through the hole and it keeps on turning; of course, it don't touch the ring until after it is slipped over the hook.

Q. Just describe to the Court what you mean by putting a stick in to keep it from turning?

A. When you start the turnbuckle, if you get a strain on there the chain is liable to turn, too.

Q. Where do you put the stick?

A. In one of the links, but you never touch the ring at all; you simply put the stick in the link to keep the chain from turning around.

Q. For instance, if your man was tightening up the turnbuckle, and this link happened to come in contact with some object upon which it is resting, might that pull the link off if the man did not [108] watch it?

A. Well, it has to be almost forced off if there is

(Testimony of Harry Stremmel.)

any strain on there at all; of course, it is very easily slipped off if the chain is not tight.

Q. That is what I am getting at. While you are tightening up the chain, is it necessary for a man to pay any attention to the link to see whether it slips, or not?

A. We never pay attention to it at all; my men always set up the chain without using any pins, or anything like that. I don't know what they do after they leave port.

Q. Just illustrate to the court about what the size of one of the turnbuckles is, that is, from end to end?

A. When it is screwed out some run from about four to five feet; after it is set up, the screws are together, and it sets up to about 3 or 3½ feet.

The COURT.—Q. How much play is there altogether, about a foot and a half?

A. A foot and a half, yes, sir.

Mr. FORD.—You may cross-examine.

#### Cross-examination.

Mr. WALL.—Q. You don't know anything about the particular turnbuckle that is involved in this case, do you, if there is a particular turnbuckle involved in this case? Personally you don't know what particular turnbuckle was involved in this case, do you, of your own knowledge?

A. No, I have not paid particular attention to the turnbuckles on the "Colusa." As far as I remember they are the same as other ships I have been on.

Q. You did not pay any particular attention to

(Testimony of Harry Stremmel.)

the turnbuckles on the "Colusa"? A. No.

Q. And so far as you know there may be two types of turnbuckle, or more than two types, in use on the "Colusa," so far as you personally know?

A. I don't know about two types of turnbuckles. There may be a little difference in the construction of a turnbuckle, but as a rule they are all the same; they are all of the [109] same type of construction.

Q. In some turnbuckles, don't they secure them with marlines or ropes? Is there not an arrangement at the end of the pelican hook for that?

A. No, my men never did that.

Q. Your men never did that on the "Colusa?"

A. No.

Q. So far as you know it was never done that way on the "Colusa"?

A. No, and so far as I know it was never done on any ship I have been on.

Q. What times were you at work on the "Colusa," do you remember, during 1916?

A. I don't remember the dates, but it is five or six different times.

Q. Was it after the last of September?

A. The last time I worked on her was in February.

Q. Of this year? A. This year.

Q. And the times before?

A. Well, every two months when she was on the South American run, she would make a round trip about every two months, on an average.

(Testimony of Harry Stremmel.)

Q. Did your gang of stevedores have charge of the loading and unloading of her when she was in San Francisco?

A. We done the work, yes; my men done the work of loading and discharging the cargo.

Q. While she was in San Francisco?

A. Yes, sir.

Q. All the turnbuckles, so far as you know, the link was kept on by the strain; is that correct?

A. The link is kept on, the more strain you get on the chain—the tighter you set up the chain the tighter the link sets onto the hook.

Q. And the turnbuckle that you know of, you didn't use a pin through the top of the link to keep it on; is that right?

A. No, I never saw a pin used yet. [110]

#### Redirect Examination.

Mr. FORD.—Q. You have, though, seen turnbuckles with a hole in the end of the pin, haven't you?

A. I don't know; I didn't pay any attention to them. In fact, I know there are turnbuckles that have not got holes.

Q. Most of them have not got holes?

A. All the turnbuckles that I have seen, so far as I know have not got any.

Q. There is one other question I overlooked asking you. Prior to the first of this year, and, say, for the six or seven months before that, did you or not unload the "Colusa" each time she was in port?



(Testimony of Harry Stremmel.)

A. Every time.

Q. So that when the "Colusa" arrived here, if she did arrive here some time in November, 1916, did you or not unload her then?     A. Yes, sir.

Mr. WALL.—We object to anything after September.

Mr. FORD.—I didn't know the date exactly that she arrived here; I was just getting at whether he unloaded it on those occasions.

Q. On the occasions when you did unload the "Colusa" in 1916, and in the early part of 1917, you did have occasion to handle the turnbuckles?

A. Every time, practically, when the ship came from Puget Sound, from the north.

Q. Do you remember unloading it at any time when she came from the south?

A. Yes, I have discharged her every time she came from the south, too; in fact, every time the "Colusa" was in port last year I loaded her and discharged her.

Q. With reference to the turnbuckles which you used on those occasions on the "Colusa," can you say whether or not they were of standard make?

Mr. WALL.—That is objected to as not proper rebuttal; it already has been gone into in full. [111]

Mr. FORD.—All right. That is all.

Mr. WALL.—No further questions.

Mr. FORD.—That is our case, your Honor. There is one question, though, that I want to ask Mr. Dunwoody.

**Testimony of George I. Dunwoody, in His Own  
Behalf (Recalled).**

GEORGE I. DUNWOODY, recalled for further cross-examination.

Mr. FORD.—Q. Before you went to work on the "Bear," did you take an examination?

A. Yes, sir; I did.

Q. Who examined you? A. The doctor.

Q. And you were passed, were you, for service on the "Bear?"

A. He told me there was no heavy work to do there and he thought—

Q. Did the doctor pass you for service on the "Bear?" A. Yes, sir; he did.

Mr. WALL.—Q. Prior to that, did you try to get any other job in the government service?

A. Yes, I tried to get on an Army transport, on the "Logan."

Q. Why didn't you get the job?

A. The doctor wouldn't pass me, he said I didn't have enough grip in my hand.

Mr. FORD.—Q. When was that?

A. That was about a week before I went on the "Bear."

Q. When did you go on the "Bear?"

A. I cannot say the exact date.

Q. About when?

A. About the 27th of January.

Mr. FORD.—Your Honor understands I am rest-

(Testimony of George I. Dunwoody.)

ing the case because your Honor said we could not go on this afternoon.

The COURT.—Well, you have a good portion of the forenoon that you might put in in introducing testimony. [112]

Mr. FORD.—It did not occur to me that the depositions were not to be read, otherwise I would have had other witnesses here.

The COURT.—What else do you want to show?

Mr. FORD.—It would be very largely along the lines I have mentioned, by showing that these appliances were standard.

The COURT.—I guess there is no question about the fact that these were standard appliances. The only question here is whether this particular one was defective. Your testimony would be cumulative. I have no desire to shut you off from any defense, but you must remember that we run here under high pressure; when a case is set for trial we inquire how long it will take to try it and we try to keep within those limits.

Mr. WALL.—If Mr. Ford will state what he expects his witnesses to testify to I would probably admit that if they were produced they would testify, subject to all legal objections.

Mr. FORD.—I intended to call a couple of other witnesses on this same line and one who could identify the particular type of turnbuckle, so as to show there was no defect in that type of turnbuckle, and that it was absolutely up to standard, and, if used as

(Testimony of George I. Dunwoody.)

common sense would require it should be used, was a little above standard. I also had intended, when I saw that Mr. Dallman was in town this morning, to get him at noon to-day and have him produced here.

Mr. WALL.—We will admit that if those witnesses were produced they would, as Mr. Ford says, so testify, except as to the fact as to the defect of the particular turnbuckle; of course, as to that, the testimony offered by Mr. Ford we would not consider that we have agreed to admit anything unless the witnesses who knew about this particular turnbuckle were produced.

The COURT.—I understand that your testimony, if produced, would simply be cumulative to that already given, that this was a standard [113] type of turnbuckle in use on the "Colusa"; but they would not undertake to say anything about the particular turnbuckle in question here.

Mr. FORD.—No, your Honor, but connected with the depositions—

The COURT.—I understand that, but the witnesses would not. I am speaking what their testimony would be.

Mr. FORD.—We have no witness who would say he used this particular turnbuckle. It is only one of a type of 40 or 50 that were on the ship.

The COURT.—And I understand that Mr. Wall will admit that your witnesses, if called, would so testify.



Mr. FORD.—And there is one other matter that I wanted to see Mr. Dallman about, but I will rest on that.

(After argument by counsel the cause was submitted.)

[Endorsed]: Filed Jul. 26, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [114]

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At a stated term of the District Court of the United States, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 16th day of March, in the year of our Lord, One Thousand Nine Hundred and Seventeen. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 16,129.

GEORGE I. DUNWOODY,

vs.

Am. Steamship "COLUSA," etc.

**Minutes of Court, March 16, 1917—Hearing.**

This cause came on regularly this day for hearing of the issues herein. F. R. Wall, Esq., was present as proctor for and in behalf of libelant. George K. Ford, Esq., was present as proctor for and on behalf of respondent and claimant. Mr. Wall and Mr. Ford made respective statements as to the nature of the action herein. On motion of Mr. Wall, the Court ordered that all witnesses to be called herein, except when under examination, be excluded from the court-

room during the taking of testimony. On motion of Mr. Ford, further ordered that respondent be allowed to file Amendment to Answer herein. Mr. Wall called Dr. L. L. Williams and George I. Dunwoody, each of whom were duly sworn on behalf of libellant and examined, and introduced in evidence the depositions of Carl Pfautsch and Hugo Dallman, and thereupon rested libellant's cause. Mr. Ford introduced in evidence the deposition of John Bergsten and called J. Gribbin and Harry Stremmel, each of whom was duly sworn on behalf of respondent and claimant. The cause was then argued by respective proctors and ordered submitted. [115]

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*In the Southern Division of the United States District Court, for the Northern District of California, First Division.*

IN ADMIRALTY.—No. 16,129.

GEORGE I. DUNWOODY,

Libellant,

vs.

The American Steamship "COLUSA," etc., and  
GRACE STEAMSHIP COMPANY, a Corporation,

Libelees.

**(Opinion and Order for Entry of Decree in Favor of  
Libelant.)**

F. R. WALL, Esq.

Proctor for Libelant.

GOODFELLOW, EELLS, MOORE & ORRICK,

Proctors for Libelees.

Libelant was injured while a seaman on board the Steamship "Colusa," because of the flying open of a pelican hook on the turnbuckle with which he was lashing a deckload of lumber. The hook was jointed so that it could open and close, and to hold it in place when closed, a ring was slipped down over its top, the ring being on the shank or immovable portion, and when slipped over the top of the movable portion held it fast to the shank and prevented it from opening. Near the point of the movable portion there was a hole through the hook in which, when the ring was in place a pin should be inserted, the protruding ends of which would keep the ring from slipping off over the end of the hook, and thus insure that the hook would not open when pressure was put upon it by means of the turnbuckle.

The contrivance was perfectly safe to use so long as the pin was in place, and kept the ring from slipping off. Instead of a split-pin which might be spread so that it would not slip out of the hole when the turnbuckle was turned, a nail was used on the day of the accident which slipped out of the hold when the head of the nail was brought to the lower side in turning [116] the turnbuckle. This released the ring, and it in turn slipped off the hook, the hook

opened releasing the lashings, and the recoil of the lashings threw the libelant from the top of the lumber where he was at work turning the turnbuckle. He was thrown through an open hatchway into the hold and sustained serious injuries. The hook was adjusted, the ring put in place, and nail inserted by the boatswain, who was directing the operations, and when all this was done the libelant was directed by him to twist the turnbuckle so as to tighten the lashings over the lumber.

From these facts the conclusion seems to me unavoidable that the accident was due to the negligence of the boatswain in placing in the hole a nail which could and did drop out instead of a slip-pin which would not, and then directing libelant to tighten the lashing. The boatswain, under the circumstances, was a seaman having command, within the meaning of this provision, of the Act of March 4th, 1915, known as the Seamen's Law:

"That in any suit to recover damages for any injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

The negligence was not wholly that of the boatswain, because he testified that there were no pins provided, and that it was consequently necessary to use nails.

The libelant is entitled to recover, and because of his suffering and decreased earning capacity a decree will be entered in his favor for \$1,500 and costs.

May 14th, 1917.

M. T. DOOLING,  
Judge.



[Endorsed]: Filed May 14, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [117]

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At a stated term of the District Court of the United States of America, in and for the Southern Division of the Northern District of California, held at the United States Postoffice and Courts' Building, in the city and county of San Francisco, State of California, on the 22d day of May, in the year of our Lord one thousand nine hundred and seventeen. Present: The Hon. M. T. DOOLING, District Judge.

No. 16,129.

GEORGE I. DUNWOODY,

Libelant,

vs.

The Am. Steamship "COLUSA," etc., and GRACE  
STEAMSHIP COMPANY, a Corporation,  
Libelees.

**Final Decree.**

This cause having been heard on the pleadings and the proof, and after argument by the advocates of the respective parties, and due deliberation had thereon, it is now by the Court

ORDERED, ADJUDGED and DECREED, That there is now due, owing and unpaid to the libelant herein, George I. Dunwoody, from the steamship "Colusa," her boilers, engines, tackle, apparel and other furniture and from the Grace Steamship Co., a Corporation, libelees herein, jointly and severally, the sum of fifteen hundred (1500) dollars as dam-

ages herein because of the injuries received by said libelant as in his libel herein alleged, together with interest on said sum, from the date of this decree until the same be satisfied, at the rate of six per centum per annum, and his costs, to be taxed, and that the same is a lien [118] upon said steamship "Colusa," her boilers, engines, tackle, apparel and other furniture; and it further appearing to the Court that said steamship, her boilers, engines, tackle, apparel and other furniture, have been released to said Grace Steamship Co., a Corporation, as claimant thereof, upon a stipulation for value in the sum of four thousand (4,000) dollars with said Grace Steamship Co., a corporation, as principal, and Maryland Casualty Company as surety, and that said principal and said surety have given a cost bond herein in the sum of two hundred and fifty dollars, it is now hereby ordered that said Grace Steamship Co., a corporation, and said Maryland Surety Company, surety, pay said libelant said sum of fifteen hundred dollars, with costs taxed at the sum of ——— dollars, together with interest on said sums from the date of this decree until the same be paid, and costs and expenses of execution, if any; and if this decree shall remain unsatisfied for ten days after the entry thereof and notice to Goodfellow, Eells, Moore & Orrick, proctors for said libelees, then said surety Maryland Surety Company shall cause the engagements of its stipulation to be performed or show cause within four days why execution should not issue against it, its goods and chattels, lands and tenements or other real estate, according to its stipulation; and if no cause be shown

within said time and as provided by the rules of this court, then it is further ordered that execution forthwith issue for the satisfaction of this decree against said claimant and against said surety, their goods and chattels, lands and tenements, or other real estate.

M. T. DOOLING,

United States District Judge. [119]

Received a copy of the within form of final decree this 15th day of May, 1917.

GOODFELLOW, EELLS, MOORE & ORRICK,

Proctors for Libelees.

[Endorsed]: Filed May 22, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 7, Judge and Decrees at page 195.  
[120]

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*In the Southern Division of the United States District Court, for the Northern District of California, First Division.*

IN ADMIRALTY—No. 16,129.

GEORGE I. DUNWOODY,

Libelant and Appellee,

vs.

The American Steamship "COLUSA," etc., (Grace Steamship Company, Claimant), and GRACE STEAMSHIP COMPANY, a Corporation,  
Libelees and Appellants.

**Notice of Appeal.**

To the Clerk of the Above-entitled Court, and to F.  
R. Wall, Esq., Proctor for Libelant:

You and each of you will please hereby take notice that the libelees above named, and each of them, hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree made and entered in the above-entitled cause on the 22d day of May, 1917, and from the whole of such decree.

Dated at San Francisco, California, this 6th day of June, 1917.

Yours, etc.,

GOODFELLOW, EELLS, MOORE & OR-  
RICK,

Proctors for Libelees and Appellants.

Service of a copy of the within is hereby acknowledged this 6th day of June, A. D. 1917.

F. R. WALL,

Proctor for Libelant and Appellee.

[Endorsed]: Filed Jun. 6, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [121]

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**Certificate of Clerk U. S. District Court, to Apostles  
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 121 pages, numbered from 1 to 121, inclusive, contain a full, true and correct transcript of certain records and



proceedings, in the cause entitled, George I. Dunwoody, Libelant, vs. The American Steamship "Colusa," etc., and Grace Steamship Company, a Corporation, Respondents, No. 16,129, as the same now remain on file and of record in this office; said Transcript having been prepared pursuant to and in accordance with the "Praeceptum for Apostles on Appeal" (copy of which is embodied in this transcript) and the instructions of the Proctors for Respondents and Appellants herein.

I further certify that the cost for preparing and certifying to the foregoing Apostles on Appeal is the sum of forty-nine dollars and seventy cents (\$49.70), and that the same has been paid to me by the Proctors for the Appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of August, A. D. 1917.

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk.

C. M. T.

[Endorsed]: No. 3043. United States Circuit Court of Appeals for the Ninth Circuit. The American Steamship "Colusa," Her Boilers, Engines, Tackle, Apparel and other Furniture, and Grace Steamship Company, a Corporation, Appellants, vs. George I. Dunwoody, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of

the United States District Court for the Northern District of California, First Division.

Filed August 29, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

GEORGE I. DUNWOODY,  
Libelant and Appellee,  
vs.

The American Steamship "COLUSA," etc.,  
(Grace Steamship Company, Claimant), and  
GRACE STEAMSHIP COMPANY, a Cor-  
poration,

Libelees and Appellants.

**Stipulation and Order Extending Time to File Apos-  
tles on Appeal and Docket Cause to and Includ-  
ing August 1, 1917.**

IT IS HEREBY STIPULATED AND  
AGREED by and between the respective parties  
hereto that the time for printing the record and fil-  
ing and docketing this cause on appeal in the United  
States Circuit Court of Appeals, for the Ninth Cir-  
cuit, may be and the same is hereby extended to and  
including the first day of August, 1917.

Dated July 2d, 1917.

F. R. WALL,

Proctors for Libelant and Appellee.

GOODFELLOW, EELLS, MOORE & ORRICK,

Proctors for Libelees and Appellants.

It is so ordered by the Court.

Dated July, 1917.

WM. H. HUNT,

Judge.

[Endorsed]: No. —. In the United States Circuit Court of Appeals, for the Ninth Circuit. George I. Dunwoody, Libelant and Appellee, vs. The American SS. "Colusa," etc., Libelees and Appellants. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Jul. 2, 1917. F. D. Monekton, Clerk.

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*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

GEORGE I. DUNWOODY,

Libelant and Appellee,

vs.

The American Steamship "COLUSA," etc.,  
(Grace Steamship Company, Claimant), and  
GRACE STEAMSHIP COMPANY, a Cor-  
poration,

Libelees and Appellants.

**Order Extending Time to File Apostles on Appeal  
and Docket Cause to and Including September  
1, 1917.**

Good cause appearing therefore, it is hereby ordered that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby extended to and including the first day of September, 1917.

Dated August 1st, 1917.

WM. W. MORROW,  
Judge.

[Endorsed]: No. —. In the United States Circuit Court of Appeals, for the Ninth Circuit. George I. Dunwoody, Libellant and Appellee, vs. The American SS. "Colusa," etc., et al., Libelees and Appellants. Order Extending Time for Docketing Cause on Appeal. Filed Aug. 1, 1917. F. D. Monckton, Clerk.

[Endorsed]: No. 3043. United States Circuit Court of Appeals for the Ninth Circuit. American Steamship "Colusa," etc., et al., vs. George I. Dunwoody. 2 Orders Under Rule 16 Enlarging Time to September 1, 1917, to File Record thereof and to Docket Case. Re-filed Aug. 31, 1917. F. D. Monckton, Clerk.







No. 3043

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

THE AMERICAN STEAMSHIP "COLUSA", her  
boilers, engines, tackle, apparel and other  
furniture and GRACE STEAMSHIP COMPANY  
(a corporation),

*Appellants,*

VS.

GEORGE I. DUNWOODY,

*Appellee.*

## BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States  
District Court for the Northern District of California,  
First Division.

GOODFELLOW, EELLS, MOORE & ORRICK,  
*Proctors for Appellants.*

Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk

By.....Deputy Clerk.





No. 3043

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

THE AMERICAN STEAMSHIP "COLUSA", her  
boilers, engines, tackle, apparel and other  
furniture and GRACE STEAMSHIP COMPANY  
(a corporation),

*Appellants,*

vs.

GEORGE I. DUNWOODY,

*Appellee.*

## BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States  
District Court for the Northern District of California,  
First Division.

### NATURE OF APPEAL.

This is an appeal from a final decree in favor of the libelant and against the steamship "Colusa" and the Grace Steamship Company, a corporation, in the sum of \$1500.00 and costs. The libel grows out of a personal injury sustained by George I. Dunwoody, a seaman on the "Colusa", alleged to have been caused through the negligence of the

libelants in supplying to him a defective working appliance, to wit: a defective turnbuckle.

The libelants answered, denying that the turnbuckle was defective or unfit for the purpose for which it was being used, and setting up as additional defenses that of assumption of risk, contributory negligence, and negligence of a fellow-servant. The answer appears at folio 13, page 15 of the Apostles, and an amendment thereto at page 21 of the Apostles, folios 19 et seq.

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#### POINTS ARGUED ON APPEAL.

The appellants complain of the decree entered by the District Court in this:

1. The evidence fails to show any negligence upon the part of the appellants or either of them.
2. The evidence fails to show that the "Colusa" was in any respect unseaworthy.
3. The evidence fails to show in any manner how the unseaworthiness of the "Colusa" complained of contributed to the accident.
4. That the negligence, if any, relied upon was that of a fellow-servant of the libelant.
5. That the court erred in allowing the deposition of the witness Hugo Dallman to be read in evidence.
6. That the risk of injury in this connection was one assumed by the seaman.

## FACTS IN BRIEF.

The "Colusa" on September 24, 1916, was leaving the port of Parita, Peru, the anchor having just been heaved, when George I. Dunwoody, the libellant, was instructed by the chief mate, one Bergsten, to set up the deck lashings, for the purpose of securing a deckload of lumber, which composed a portion of the cargo. These deck lashings are composed of two chains with one end fastened to each side of the ship. The chains are brought together in the center of the ship on top of the deck load and fastened together by an appliance called a turnbuckle. This appliance is a rod about 5 feet long, one end of which is fastened permanently to one of the deck lashing chains, and on the other end there is a hinged hook in which the other deck chain is placed, which hook is then prevented from opening by means of a slip-link which is placed around the shank of the hook and over the end of the hinged portion. When this hook and link are placed in position the deck lashings are then drawn taut or cinched up on the deckload by turning the rod in the middle of the turnbuckle. This rod is threaded at each end and as it is turned by means of a monkey wrench the ends of the chains are drawn together until they tightly secure the deckload to the ship. This turnbuckle device therefore, works on about the same principle as an ordinary vise.

Although as we propose hereafter to show that this was a standard turnbuckle, and good seaman-

ship required no further means for the holding of the slip-link upon the hook than the pressure applied through the vise (the security of the link increasing in proportion to the force brought to bear by the vise screws) for the better safeguarding of the welfare of the sailors, the turnbuckles on the "Colusa" had had a hole bored in the outer or hinged end of the hook (this being referred to in the record as the pelican hook) in which a nail was inserted after the slip-link was in place to prevent the possibility of the link slipping off the end of the hook and thus unloosening the turnbuckle. This hole and nail were really unnecessary for the operation of the turnbuckle, and only an added precaution, as is shown by the testimony of the witness Harry Stremmel, a man of 19 years' experience at sea. He testified on pages 127 and 128 of the record concerning the appliance in question as follows:

"Q. For about how many years have you had to do with ships?

A. 19 years.

Q. From your observation of the appliances on the 'Colusa', can you state whether or not they are standard, particularly with reference to the type of turnbuckle used there?

A. Well, in my judgment they are standard.

Q. Is there more than one type of turnbuckle used on ships?

A. Well, there may be; they are not all exactly alike. There may be minor little differences in the construction of a turnbuckle.

Q. Do you recall that you used any of this type of turnbuckle that has a hole through the



end for the pin that the link slips over so as to hold the link from slipping off?

A. I cannot remember whether I ever saw a hole in the end of the pin.

Q. The ones you saw, you never remember of seeing that hole used at all; is that the idea?

A. No.

Q. What holds the link on?

A. The strain on the turnbuckle holds the link on.

Q. As I understand you, then, when the turnbuckle is screwed up and the strain comes onto the pelican hook, it, of itself, holds the link on?

A. The more strain you get on the chain, on the turnbuckle, the tighter the ring is on.

Q. How is the link kept on until you get the strain on the turnbuckle?

A. It is slipped on and then the turnbuckle is set up.

Q. What is there to prevent its slipping off while you are setting up the turnbuckle?

A. Nothing at all.

Q. How about the man who is turning it up, can he see if it is slipping off?

A. Yes, if he is watching the ring he can see if it is slipping I suppose.

\* \* \* \* \*

Q. That is what I am getting at. While you are tightening up the chain, is it necessary for a man to pay any attention to the link to see whether it slips, or not?

A. We never pay attention to it at all; my men always set up the chain without using any pins, or anything like that. I don't know what they do after they leave port."

On the day of the accident the libelant was in the act of tightening up a turnbuckle on No. 1 hatch, when something occurred, the record being silent as to what actually did take place, and the seaman

fell off the deckload and into the hatch, sustaining a broken arm and sprained ankle.

The libel proceeds on the theory that the nail which was placed in the hole of the pelican hook was an improper appliance to be used for that purpose, and that this nail fell out of the hole, thereby causing the link to slip off and the hook to fly open, thus injuring libelant.

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#### IMPORTANCE OF VIEWING TURNBUCKLE.

At the time of the trial of this cause the "Colusa" was at sea, and the turnbuckle in question could not be produced. Upon her next landing at this harbor a turnbuckle of the exact type and character of this one, perhaps the same one, as they are all similar, was removed from the vessel, and an effort was made to submit it for the inspection of this court by way of additional proof. This application was denied, without prejudice to its renewal at the time of hearing. From what has gone before, the *imperative necessity* of having this court view the appliance becomes apparent, and it is submitted that for a clear understanding of the issues here involved, the court should permit the introduction of this turnbuckle in evidence at the time of hearing.

THE COURT ERRED IN ADMITTING THE DEPOSITION OF  
WITNESS DALLMAN.

For the more orderly presentation of our argument, we first take up the fifth point upon which the appellants predicate prejudicial error, as outside of the questionable testimony of the witness Dallman, the record is entirely devoid of any showing of negligence upon the part of the appellants. The objections to the introduction of this deposition are included in Specifications numbered 18, 19 and 20. *By some oversight the clerk, in preparing the transcript failed to include therein the specifications of error, but we have his assurance that the same will be printed and before the court at the time of this hearing.*

The deposition *de bene esse* of Hugo Dallman, the boatswain of the "Colusa", at the time of the accident, was taken in San Francisco, on December 29, 1916, on behalf of the libelant. No grounds for the taking of this deposition are assigned, as it appears that the witness was then, and at the time of trial, a resident of, and at both times actually in, San Francisco. At the taking of the deposition all *objections to the materiality and competency of the testimony was reserved by the parties* (~~folio 627~~) (page 20, 21)

This deposition was presumably taken under authority of Section 863, Revised Statutes, under the supposition that the witness, being a sailor might leave the jurisdiction.

At the time of the taking of the deposition it was clearly the intention of the parties to have Dallman present at the trial in the event he was within the jurisdiction. This is clearly shown by the portion of the deposition appearing at page 89 of the Apostles as follows:

“A. I have got relatives here in 'Frisco, if you would like to know that.

Q. Where is that?

A. They live on Sixteenth Avenue.

Q. What number?

A. 466.

Q. Do you expect to leave San Francisco?

A. No.

Q. How long do you expect to remain here?

A. I expect to take out my license pretty soon; I don't have to remain here forever. (76)

Q. You expect to take out your license pretty soon?

A. Yes.

Q. How long will that keep you here?

A. I will get my citizen's papers in four or five months; it will take me at least three or four months to go to school.

Q. You will be here for seven or eight months?

A. I will not leave for the next year.

Q. You will be here for the next year?

A. I might take a ship again, go to sea, you know.

Q. What I was getting at is, so that I could get information of how to locate you in case this matter could come on for trial. I would like very much to have you as a witness in court and have you explain that turnbuckle to the court.”



The introduction of the deposition was properly objected to at the trial in the following language at pages 118 and 119:

“Mr. FORD. Now, your Honor, as to the depositions,—as to the deposition of the one I mentioned, first, Carl Pfautsch, there is no objection to that deposition. As to the deposition of Dallman, which was taken on the 29th day of December, 1916, we do object to its use for the following reasons: First, that there is no showing made that the witness is absent from the jurisdiction of this court; second, that it appears from the face of the deposition, from the conversation between counsel, that it was expected that this particular witness would be produced personally if he was not at sea at the time the trial came on. I have not had an opportunity personally to look over the deposition, but my recollection is very clear on the matter that on cross-examination I pointed out to the witness and to Mr. Wall both that as (100) to this particular witness we desired him in court. I presume there is no dispute between Mr. Wall and myself but that the witness is in town today.

Mr. WALL. I don't know whether he is in town, or not; I don't think it makes any difference.”

The court overruled the objection and the deposition was read into the record. This was clearly error for the reason that the whole deposition was incompetent if the witness was available at the time of trial, and the burden of showing the competency of the deposition was on the libelant.

In making the ruling the trial court entirely disregarded Section 865, Revised Statutes, which is as follows:

“Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. *But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.*”

No showing of any kind was made or attempted to be made that the witness was not available, in fact the court seemed to be guided by libellant's counsel's remark “I don't think it makes any difference”. It is well established that prior to the admission of a deposition of this kind, it is incumbent upon the party offering the same to first prove its competency. Thus in *The Patapsco Insurance Co. v. Southgate et al.*, 5 Peters (U. S.) 604, it is said:

“In all these cases, except where the witness lives at a greater distance than one hundred miles, it will be incumbent on the party for whom the deposition is taken, to show at the trial that the disability of the witness to attend personally continues, the disability being sup-

posed temporary, and the only impediment to a compulsory attendance. The act declares expressly that, unless the same (that is, the disability) shall be made to appear on the trial, such deposition shall not be admitted or used in the cause. This inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles, he being considered permanently beyond a compulsory attendance. The deposition in such case may not always be absolute, for the party against whom it is to be used may prove the witness has removed within the reach of a subpoena after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The *onus*, however, of proving this, would rest upon the party opposing the admission of the deposition in evidence.”

This case is decided on sound legal principles and merely follows the unmistakable wording of the statute.

Effort will be made to show that appellants stipulated to the introduction and reading of this deposition in any case, but an examination of the stipulation (pages 70 and 71, Apostles) clearly shows that a reservation was made with respect to the competency of the testimony, and that it could only be read in the event a sufficient showing for its introduction at all was made. *The very apparent error of the trial court in this regard was highly prejudicial in view of the fact that without the deposition of Dallman in the record, no possible showing of negligence has been made.* Dallman’s deposition must be deemed out of this case. The

proof that Dallman was within the jurisdiction of the court, was contained in his deposition itself.

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THE EVIDENCE FAILS TO SHOW ANY NEGLIGENCE UPON  
THE PART OF THE APPELLANTS OF ANY UNSEAWORTH-  
INESS OF THE "COLUSA".

Turning now to the other points urged in support of the appeal in the order heretofore outlined. This record fails to show any condition of the vessel or its appliances in an unseaworthy condition, and the record further fails to show how the accident happened or what caused the same.

All told, four members of the crew testified, three by deposition, and the libelant. *No one actually saw the accident.* The three members of the crew aside from the libelant were near at hand, but did not see the actual occurrence.

John Bergsten, the mate, under whose direction this work was being done, did not see the accident. He testified as follows at page 29 of the Apostles:

"Dunwoody was setting up this chain lashing, under my directions there,—I was standing on the chain on the port side, and he was behind me about fifteen feet; he was using—he had to use, to get the power to set this turn-buckle,—he had to use a key wrench, or pipe wrench, as we call it, about thirty-six inches long, to get the weight off the deckload; he was occupied in setting it up, and I was standing on the chain on the port side to feel the weight of it. All of a sudden I felt the chain give away from under me, and I looked back and Dunwoody had disappeared. He fell over back-



wards and I found him on top of the hatch combing and cargo.

Q. Who besides yourself and Mr. Dunwoody, and if anybody, had anything to do with the fastening of this particular deck lashing on No. 1 hatch?

A. Nobody."

Carl Pfautsch, a seaman working on the next hatch, saw nothing of the accident.

Hugo Dallman, the boatswain, testified at page 79, Apostles:

"A. Well, I did not see when it happened (referring to the accident)."

Dunwoody, the libelant, at pages 109 and 110 of the Apostles, testified as follows:

"A. As soon as he (93) told me to set it up, all the men left and went forward of the No. 2 hatch to set up the rest of the lashing. I sat down on the edge of the deckload and started to setting it up.

The COURT. Q. The ends of the lashing came together on the edge of the deckload?

A. Yes, sir, right on the edge of the deckload.

Mr. WALL. Q. How far out did you have to reach from the edge of the deckload to set up the turnbuckle?

A. About two feet, I should say.

Q. All right, now go ahead from that point.

A. The next thing I was down in the hold, and I sung out and the mate asked me if I was hurt, and I told him I was; I told him I thought my leg was broken, and my arm."

This is all of the testimony concerning the happening of the accident. We take it that the libelant must prove the allegations of his libel. The mater-

ial allegations of the libel are found at pages 8 and 9 of the Apostles:

“Libelant was on said day at work on board of and in the service of said vessel and there engaged on the deckload of said vessel in setting up a turnbuckle in order to tauten the lashings or fastenings of said deckload of said vessel; that while libelant was so engaged, the forelock or pin that secured or held in place the link over the pelican hook of said turnbuckle slipped out and libelant was because of said slipping out of said pin thrown off of said deckload and fell from said deckload through the open hatch of number one hatch of said vessel, a distance of about 17 feet, and in so falling struck with great force and violence upon the boxes under the opening of said hatch and was by so striking injured as aforesaid.”

Wherein in the record is it shown or can it even be inferred that this accident was caused by the slipping out of the pin that secured the pelican hook? No one knows how the accident happened except Dunwoody, himself, for no one was looking at him at the time, and Dunwoody prefers to have the court in ignorance of the cause rather than to state it. Even Dunwoody does not attempt to testify that the pin slipped out. What caused this accident is wholly surmise and conjecture so far as the record is concerned. The libelant cannot recover on the doctrine of *res ipsa loquitur*, he must show that this accident was caused by the unseaworthiness of the vessel in accordance with his allegations. This he has failed to do.

But none of the witnesses except Dallman, testify that the nail used in the pelican hook was improper, and even conceding for the purposes of this argument that the pin did slip out as alleged, this under the evidence would not support the decree, as the record shows that a nail was a fit and proper appliance.

Bergsten, the mate, at page 36, testified:

“Q. What is the usual type of pin which was used to put into that hole, to hold that ring, on the steamship ‘Colusa’?”

A. A threepenny nail.

Q. Did, or did not, a threepenny nail fit the hole?

Q. State whether or not a threepenny nail would fit this hole?

A. Yes, sir; it would just fit the hole.

Mr. PALMER. Could any larger bolt have been inserted into it? (33)

A. Yes, but not very much larger. We always use a threepenny nail, but there is room to get a little larger pin in, but we always used a threepenny nail.

Q. Did you find any signs of there having been a nail in this hole after the accident?

A. No, sir; after we carried Dunwoody aft, I returned forward to see if anything broke, and I found everything all right except this link was slipped off and the chains disconnected, which couldn't have been disconnected any other way without the link slipping off.”

Seaman Carl Pfautsch testified that the nail in the pelican hook was always used. His testimony is at pages 60 and 61 of the record:

“Q. How did you happen to notice this nail that was put in this pelican hook, in the ring from the pelican hook?

A. How do you mean?

Q. How did you happen to notice that? That was done always, was it not?

A. Yes, that was always done.

Q. How did you happen to notice at this particular time what kind of a nail was used?

A. We used always the same nail.

Q. Did you use the same kind of nail this time?

A. Yes.

Q. Who put it in there?

A. I can't remember that.

Q. How did you notice it was the same kind of a nail that you always used?

A. Well, because we used the same nail—we had to tighten up some more of these turn-buckles, and we used the same kind of nail.

Q. What I want to get at is, did you actually see that nail in the pelican hook, or are you just stating that because you always used it?

A. No, I saw the nail.

Q. How did you happen to see it?

A. Well, because we always used the same kind of nail.

Q. Did you, on this particular occasion, see the kind of nail that was used, or are you just saying that because that was what you always did? Which?

A. Well, I can't say exactly, but I know that was the same kind of nail."

Even this witness Dallman testified that it was regular practice to use the nail in the hole of the pelican hook. His testimony on that subject appears at page 91, Apostles, as follows:

"Why did you say that you put in this particular nail?

A. Because I put it in there.

Q. You remember it, do you?



A. Yes, I do remember it.

Q. The turnbuckle over at hatch No. 2, did you put the nail through there, when you went over to No. 2?

A. I always done that; I had the nails in my pocket, and after we got the turnbuckle on I put the nail in, and I told them to set them tight afterwards, and we went to the next one.

Q. You always put in the nail yourself at each place?

A. I always done that, every time; I had the nails in my pocket and put them in.

Q. You always used the same sized nail?

A. Yes.

Q. You used that same sized nail this time?

A. Yes.

Q. Was it a new nail or an old one?

A. They were new nails."

Dunwoody, the libellant testified that they always used a nail on board the "Colusa" in the pelican hole—that this was regular practice. His testimony is on page 108:

"Q. Over the top of the ring, what was there, if anything, that passed through the pelican hook?

A. A forelock or pin—a nail, in this case.

Q. A forelock, or nail?

A. A nail is what we used on that ship."

Witness J. Cribbin, a man of much nautical experience, testified that nothing else but a pin could be used in the hole, if in fact any was used. He testified on pages 123, 124:

"Q. That is, in your experience with this particular class of turnbuckle, the link will stay there until you knock it off?

A. Yes, with a block of wood, or something; it never slipped off with us. We always have to hit it to get it off.

Q. In the last two years how many occasions have you had of the men under you, to use a turnbuckle in lashing up the deck?

A. That is pretty hard to say. Every ship that comes down from Puget Sound that we handle and that is going to South America, we have to do the same thing.

Q. What is used as a pin to go over that hole in the turnbuckle, usually?

A. We don't use the pin. We tie it up with what we call a rope yarn, or a small marline we tie that up with a rope marline,—that is a small piece of rope; we never use a pin in there; in fact, the only thing that could be used would be a nail.

Q. Do you know what size nail?

A. A three-inch nail." (104)

The witness Stremmel, formerly chief mate, and 19 years a follower of the sea, a man fully familiar with turnbuckles, testified that no pin was necessary. He says at page 132:

"Q. All the turnbuckles, so far as you know, the link was kept on by the strain; is that correct?

A. The link is kept on, the more strain you get on the chain—the tighter you set up the chain, the tighter the link sets onto the hook.

Q. And the turnbuckle that you know of, you didn't use a pin through the top of the link to keep it on; is that right?

A. No, I never saw a pin used yet." (110)

The court conceded that the turnbuckles on the "Colusa" were standard appliances when at page

135 the trial judge, at the conclusion of the case, said:

“The COURT. I guess there is no question about the fact that these were standard appliances. The only question here is whether this particular one was defective. Your testimony would be cumulative. I have no desire to shut you off from any defense, but you must remember that we run here under high pressure; when a case is set for trial we inquire how long it will take to try it and we try to keep within those limits.”

And again at page 136 as follows:

“The COURT. I understand that your testimony, if produced, would simply be cumulative to that already given, that this was a standard (113) type of turnbuckle in use on the ‘Colusa’; but they would not undertake to say anything about the particular turnbuckle in question here.”

Thus we are confronted with a situation where it is established to the satisfaction of the court that the appliance used was standard in every respect, and that it was being used as turnbuckles are always used. No defect is shown to exist in the particular appliance, no showing is made as to how or why the accident is caused, no witnesses testify that they saw the accident or know the cause, and still a decree is made against the appellants on the ground that the vessel was unseaworthy.

We challenge counsel to point out in this record any testimony proving or tending to prove that the pin in question slipped out of the pelican hook, we

challenge counsel to point out in this record any testimony showing how this accident happened; we challenge counsel to point out in this record any testimony showing that this appliance was not a standard appliance being used as it was always used; we challenge counsel to point out any testimony proving or tending to prove any unseaworthiness of this vessel, except in the testimony of the witness Dallman, whose deposition was improperly admitted in evidence.

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**THE EVIDENCE FAILS TO SHOW IN ANY MANNER HOW THE  
UNSEAWORTHINESS OF THE "COLUSA" COMPLAINED OF  
CONTRIBUTED TO THE ACCIDENT.**

Under the preceding head we have discussed the allegation of the libel with respect to unseaworthiness. This was the alleged unfitness of a nail to be used as a forelock pin in the pelican hook (Apostles, page 9). We have heretofore reviewed all of the testimony bearing on the actual accident and have shown that its cause is a matter of speculation and conjecture. In this connection we again call to the attention of the court the entire failure upon the part of libelant to show *any connection whatever* between the use of a nail as a pin in the hole of the pelican hook and the happening of the accident. The record being silent as to the casual connection between the use of the nail and the happening of the accident, we submit the decree is unsupported by the evidence.



**THE NEGLIGENCE IF ANY WAS THAT OF A FELLOW-SERVANT  
OF THE LIBELANT.**

The judgment of the court is based entirely upon the theory that a nail was used in place of a split pin in the hole of the pelican hook, and that the negligence consisted of the boatswain placing this nail in the hole. To avoid the effect of having the actionable negligence that of a fellow-servant, thus precluding a recovery, the libelant attempted to show that the boatswain was "a seaman in command" and thus under the Act of March 4, 1915, known as the Seaman's Act, he was not a fellow-servant of libelant. The court so held, but we think against the weight of evidence, for the mate and not the boatswain was in command of this work.

For the purposes of this discussion, and for this purpose alone, we must consider the deposition of Dallman properly before the court, as without this testimony no negligence is shown, and the libelant's case must fall.

The mate Bergsten swears that he was in charge of the work in question. He testified at page 29:

"Dunwoody was setting up this chain lashing *under my direction there*—I was standing on the chain on the port side, he was behind me about 15 feet. \* \* \*

Q. Who, besides yourself, and Mr. Dunwoody, and if anybody, had anything to do with the fastening of this particular deck lashing on No. 1 hatch?

A. Nobody.

Q. Then as I understand your testimony, all of the work in connection with putting this

deck lashing in place was done by yourself and Mr. Dunwoody.

A. Yes, by myself and Mr. Dunwoody."

Now Dallman and Dunwoody attempted to make it appear that the work of lashing the deckload was in charge of the former, as boatswain, and thus reap the benefit of the Act of 1915 referred to above, but as shown by Dallman's own testimony, he was at the time under the direction and control of the mate, and the *mate, not the boatswain* was the "seaman having command".

Dallman says in regard to his work, page 77:

"Q. What are the duties of a boatswain aboard vessels plying out of San Francisco and Pacific Coast ports?

A. To take charge of the deck work as directed by the mate."

Again at page 86:

"A. Well, I don't see how you mean that; I had to do as I got told; I am not responsible.

Q. You are not responsible?

A. When I am boatswain of the ship and the mate says, 'You do that', that is the way it is done."

Thus it can be readily seen that the work was actually in charge of the mate; the mate was present in person and had charge and command of the work. As a consequence the boatswain could not be the "seaman in command".

By "seaman having command" is meant a seaman having some charge over the navigation of the

vessel, in which class the boatswain does not fall. If he was not the "seaman having command", the negligent acts found by the trial court to have been performed by him were not actionable, as he was the fellow-servant of the libelant.

So far as a thorough examination of the authorities discerns, no construction has ever been placed by the courts upon the words "Seaman having command", except *In re Tonowanda Iron & Steel Company*, 234 Fed. 198. In that case the court holds that the new Seaman's Act of March 4, 1915, creates a new liability on ship owners, making them responsible for the negligent acts of the officers charged with the responsibilities of the navigation of the vessel. Prior to the passage of the act, all seamen on board a vessel, with the possible exception of the captain, were fellow-servants engaged in a common purpose of navigating the vessel. Following the passage of the act in question, those officers *charged with the responsibilities of navigation of the vessel* were taken out of the class of fellow-servants, and the *Tonowanda Iron & Steel Company case* (supra) so holds, for in that case it is said at pages 201, 202:

"So, also, in the case at bar the Seaman's Act made a substantive change in the maritime law of the land creating a new liability—not simply changing methods of procedure or rules of evidence or affecting the statute of limitation—and making the ship or her owner answerable for the negligence of the officers

charged with the responsibility of her navigation, as a result of which a seaman sustains injuries.”

Who are the seamen in command, or in other words, who are the officers charged with the responsibility of the navigation of the ship? It would seem clear that an injury caused by a fellow-servant not responsible for the navigation of the vessel is not covered by this statute.

Section 4612 of the Revised Statutes provides that:

“Every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a seaman.”

It would seem that all such persons cannot be said to be seamen in command. Seamen, therefore, other than those in command or responsible for the navigation of the vessel, although they may have a petty command over subordinates would not be called seamen in command. So far as these seamen are concerned, it would seem that the same fellow-servant rule would still apply and could be invoked as a legitimate defense in an action brought by an injured seaman for injuries caused by the negligence of such co-employees or seamen.

In this case the court found, page 140, Apostles, that any actionable negligence was that of the boatswain, and holds that he was a “seaman having command”. This finding is not supported by the evidence, for as we have shown, the mate and



not Dallman was in actual command, but in addition to this we have the authority of the *Tonowanda* case, supra, to the effect that "seamen having command", refers to officers "charged with the responsibility of the navigation of the vessel". It will not be attempted to be shown by the appellee that a boatswain ever was an officer under this classification, he is not a licensed officer.

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#### THE LIBELANT ASSUMED THE RISK OF THIS INJURY.

In this case the libelant was provided with a standard turnbuckle not shown to have been defective. He had used the same type of appliance on board this vessel many times before. All that he has shown is that the turnbuckle flew open. The record is silent as to why this happened. The mere opening of the turnbuckle does not make out a cause of action, its opening must be shown to be because of some unseaworthy condition of the appliance. As to risks of injury not caused by some unseaworthy condition of the ship's furnishings, no liability rests on the owner or the vessel, and they are assumed by the seaman.

The doctrine of assumption of risk is applied in Admiralty as well as in other branches of jurisprudence, notwithstanding the rule that damages will, in some cases of concurrent negligence, be divided.

The libelant, a fireman employed upon the claimant's vessel, was injured as a result of a fall which occurred while he was climbing a ladder upon the vessel. The ladder was defective at one end. The libelant knew the condition of this ladder as he had often had occasion to use it in the performance of his duties. The court, in holding that the libelant had assumed the risk which caused his injury, said:

“In speaking for the Circuit Court (28 Fed. 881) Judge Wallace pointed out that although, in cases of marine torts, admiralty courts are in the habit of proceeding upon enlarged principles of justice and equity, still this does not imply ‘that such courts do not proceed upon settled rules equally with courts of equity or of common law’. The language of the decision shows that the court did not intend to ignore the recognized features of the law of negligence, nor to disregard the accepted doctrine of the assumption of risk. Such intention is not shown in the decisions of the higher federal courts. In the *Dredge Case*, 134 Fed. 161, the Circuit Court of Appeals in this circuit, did not intimate that the principles pertaining to assumption of risk and other well-recognized principles of the law of negligence are to be overridden in a court of admiralty.

In the *Saratoga*, 87 Fed. 349, the District Court divided the damages on the ground that the servant's injury was due to the combined and concurrent negligence of himself and the ship. This decision was reversed by the Circuit Court of Appeals in 94 Fed. 221, where, in speaking for that court, Judge Lacombe held that the libelant had a complete knowledge of the hatches which were alleged to have been defective, and that he must be held to have taken the risk. The court said:

‘With the knowledge of this condition of things the libelant must be held charged \* \* \* The libelant must be held to a knowledge of the conditions under which the work was done, since it had been done in the same way repeatedly and usually during his employment.’

In the *Serapis*, 49 Fed. 393, the District Court held it to be a case of concurrent faults, and divided the damages; but in 51 Fed. 92, the Circuit Court of Appeals reversed the District Court, and held that the owners of the steamship could not be held negligent for having on board the ship a winch which had been there for over six years in continual use, but requiring more care on the part of the person who worked it than some modern machines. The case showed that the machine was well known to the employee, and that it was well known to him that it required more attention on his part than other machines fitted for similar use. The court held that the libelant assumed the risks of all accidents.

In the *Maharajah*, 40 Fed. 784, Judge Brown held that: ‘A workman employed to work a particular machine, which he fully understands, takes the risk of accidents that may happen to him while using it, so long as the machine is maintained in the same condition as by his contract he has the right to expect and to rely upon.’

In the *Henry B. Fiske*, 141 Fed. 188, a case where a defective patent rider broke, such rider forming part of the tackle, apparel, and furniture of a schooner, it was held that, if no sufficient reason appears why the breaking of the rider should have been anticipated, such danger as lay in the possibility of its breaking was a risk assumed by the libelant, a seaman on the vessel, as incident to his employment. The court says:

‘Damages are claimed by reason of the alleged unsound and defective condition of the rider which broke. No evidence was offered to prove that the rider was unsound or defective beyond the fact that it broke. *Unless the owners or master were negligent in regard to the condition of the rider, neither they nor the vessel are liable for the injury to the libellant caused by its breaking.*

As regards the crew employed on board the vessel, there is no warranty on her part that none of her fittings or appliances shall, at any time, give way, to their injury. Liability on her part, in a case of an accident of this kind, is incurred only when those who represent her have failed to exercise reasonable care to make the fittings or appliances safe and arising out of such defects as reasonable care on their part would have discovered and remedied. If no sufficient reason appears why the breaking of the rider should have been anticipated, such danger as lay in the possibility of its breaking was a risk assumed by the libellant as incident to his employment.’ ”

See also the *Karl*, 18 Fed. 655; also the *Luckenbach*, 53 Fed. 662; also a *Corpus Juris.*, page 13,127; also the *Concord*, 58 Fed. 913; also *Oregon Lumber Company v. Portland Steamship Company*, 162 Fed. 912.

If the accident happened by reason of the pin falling out of the pelican hook, this was a risk assumed by Dunwoody, for it was an injury caused by the improper manner in which the work was being carried on. The appliance was in full view and immediately in front of Dunwoody for he says he saw the nail in the hole.



“Q. With reference to setting up this turnbuckle, when you started with your stillson wrench to screw up the turnbuckle did you look to see whether or not the pin had been inserted in the pelican hook?

A. I did.

Q. And what did you see?

A. I saw a nail.

Q. What kind of a nail did you see?

A. A nail about three inches long, I should say, or two and a half inches.”

If the nail did in fact fall out, it was the action of Dunwoody in improperly turning the appliance that caused it thus to fall. He must assume the risks of his own carelessness, unconnected with any unseaworthiness of the vessel.

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#### IN CONCLUSION.

The trial court has based its finding in this case wholly on the evidence contained in the deposition of the Boatswain Dallman. Dallman, as the record shows, had left the ship and had a suit pending against the captain for his wages (pages 87, 88). It is from his testimony, and his alone, that the court found that a split pin was a necessary appliance to be used with this pelican hook. Without Dallman's deposition the decision and its resultant decree cannot stand, and we feel confident in our position that the deposition was inadmissible. No other witness so much as refers to a split pin.

Even with Dallman's deposition in the record, no negligence upon the part of the appellants is shown.

The appliance was standard in every respect. This court is as able to judge the Dallman deposition as was the trial court. The impossibility of using a split pin in the pelican hook is apparent for the very purpose of the turnbuckle is to lash the deck-load fast, but in such a manner that it can be readily slipped in case of high seas or danger. With a split pin this could not be done, and grave danger to the ship would result.

No showing is made how or why the accident occurred. Until this is done no decree can lie, because risks other than those caused by defective equipment were assumed by Dunwoody.

If the court should, in the face of the statute and the decided case, decide that Dallman's deposition was properly admitted, then, too, the decree must fall, for the theory of the decision of the court below is that the negligence was that of the boatswain, and he is not a licensed officer charged with the responsibility of the navigation of the vessel.

It is earnestly urged that the decree of the court below be reversed.

Dated, San Francisco,

October 8, 1917.

GOODFELLOW, EELLS, MOORE & ORRICK,  
*Proctors for Appellants.*

No. 3043.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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THE AMERICAN STEAMSHIP "COLUSA," her boilers,  
engines, tackle, apparel and other furniture, and GRACE  
STEAMSHIP COMPANY (a corporation),

vs.

Appellants,

GEORGE I. DUNWOODY,

Appellee.

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**BRIEF FOR APPELLEE.**

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F. R. WALL,  
Proctor for Appellee.

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Filed this.....day of October, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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The James H. Barry Co.  
San Francisco

FILED  
OCT 20 1917  
F. D. MONCKTON  
CLERK





IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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The American Steamship "COLUSA," her boilers, engines, tackle, apparel and other furniture and GRACE STEAMSHIP COMPANY (a corporation),	}	No. 3043
<i>Appellants,</i>		
vs.		
GEORGE I. DUNWOODY,	}	
<i>Appellee.</i>		

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**Brief for Appellee.**

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STATEMENT OF THE CASE.

Appellants' statements of the "Nature of the Appeal and Facts in Brief" are controverted; for the reasons that they do not properly state the questions involved and that the latter is not correct in stating that the appellee was instructed by the mate to set up the deck lashings. The opinion of the trial court contains a cor-

rect statement of the case. We quote therefrom from the Apostles, page 139, *et seq.*, as follows:

"Libelant was injured while a seaman on board the Steamship 'Colusa,' because of the flying open of a pelican hook on the turnbuckle with which he was lashing a deckload of lumber. The hook was jointed so that it could open and close, and to hold it in place when closed, a ring was slipped down over its top, the ring being on the shank or immovable portion, and when slipped over the top of the movable portion held it fast to the shank and prevented it from opening. Near the point of the movable portion there was a hole through the hook in which, when the ring was in place, a pin should be inserted, the protruding ends of which would keep the ring from slipping off over the end of the hook, and thus insure that the hook would not open when pressure was put upon it by means of the turnbuckle.

"The contrivance was perfectly safe to use so long as the pin was in place, and kept the ring from slipping off. Instead of a split-pin which might be spread so that it would not slip out of the hole when the turnbuckle was turned, a nail was used on the day of the accident which slipped out of the hole when the head of the nail was brought to the lower side in turning the turnbuckle. This released the ring, and it in turn slipped off the hook, the hook opened releasing the lashings, and the recoil of the lashings threw the libelant from the top of the lumber where he was at work turning the turnbuckle. He was thrown through an open hatchway into the hold and sustained serious injuries. The hook was adjusted, the ring put in place, and nail inserted by the boatswain, who was directing the operations, and when all this was done the libelant was directed by him to twist the

turnbuckle so as to tighten the lashings over the lumber.

"From these facts the conclusion seems to me unavoidable that the accident was due to the negligence of the boatswain in placing in the hole a nail which could and did drop out instead of a split-pin which would not, and then directing libellant to tighten the lashing. The boatswain, under the circumstances, was a seaman having command, within the meaning of this provision, of the Act of March 4th, 1915, known as the Seamen's Law:

"That in any suit to recover damages for any injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority.'

"The negligence was not wholly that of the boatswain, because he testified that there were no pins provided, and that it was consequently necessary to use nails."

It is, therefore, apparent from the above that the negligence of the boatswain was involved, as well as the negligence relative to the defective appliance.

#### DALLMAN'S DEPOSITION PROPERLY IN EVIDENCE.

The stipulation under which this deposition was taken reads as follows (Ap., 70-71):

"The deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, . . . and that all objections as to materiality and competence of the testimony are reserved to all parties."

Substantially the same stipulation was entered into as to the deposition of appellants' witness Bergsten (A., 25) and appellee's witness Pfautsch (A., 55).

The Apostles of this court contain hundreds, if not thousands, of depositions similarly taken; and this is, we think, the first time that such an objection has ever been raised. Appellants say (Br., 11), "it could only be read in the event a sufficient showing for its introduction at all was made." In the face of their solemn stipulation that the deposition, "*when written up, may be read in evidence*" and of all of the other circumstances, we say the objection presented and now urged seems nothing less than outrageously reprehensible. The other circumstances appear from the record as follows:

Appellants in December, 1916, knew the address of Dallman and where he was working and knew that he might go to sea (A., 89, 95). The case was not tried until March 16, 1917, yet during all of that time appellants made no effort to take his testimony or to put him under subpoena, although it was appellants' counsel who expressed a desire to have him as a witness in court: "I would like very much to have you as a witness in court" (A., 89). And it was this same counsel who then said: "Now, Mr. Wall, I will arrange, if we want Mr. Dallman's testimony further, if we conclude that there is danger of his not being here, to have him identify one of these turnbuckles—I will arrange to get him down here" (A., 96, 97). No ob-



jection was made to this deposition until the morning the case came on for trial and after the trial was nearly finished. Further, when counsel was told by the court, "I have no desire to shut you off from any defense" (A., 135), counsel made no request for a continuance to have the court hear Dallman or to take Dallman's deposition before the case was decided. The case was submitted March 16, and not decided until May 14th following; yet during all that time no request was made to take his testimony.

In *Howard v. Stillwell, etc.*, 139 U. S., 202, the deposition was objected to on the ground, among others, that it "was not taken on the authority of any *dedimus potestatem* granted by any court of the United States according to common usage." The court there said (p. 205):

"It is the settled rule of this court that the failure of a party to note objections to depositions, of the kind in question, when they are taken, or to present them by a motion to suppress, or by some other notice before the trial is begun, will be held to be a waiver of the objections. Whilst the law requires due diligence in both parties, it will not permit one of them to be entrapped by the acquiescence of the opposite party in an informality which he springs during the progress of the trial, when it is not possible to retake the deposition." (Citing cases.)

And, in admiralty, as pointed out in Sec. 464 Ben., 4th ed.:

"Allusion has already been made to the power of the court to vary, interrupt, or postpone proceedings when the cause of justice may require it. So, after the hearing of the case is concluded, on proper cause shown, the court will withhold the conclusion of the cause for the purpose of hearing further proof. This is sometimes . . . ordered on the application of the party. . . when it is necessary to enable him to supply omissions."

"An objection, however, has been made, preliminarily, to this court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the court for that purpose.

"Admitting this to have been irregular, no objection appears to have been made in the court below, to the reading of the deposition; and had it been made, it ought not to have prevailed even there, because the defendants cross-examined the witness, which would be considered a waiver of the irregularity." *Mechanics Bank v. Seton*, 1 Pet., 307, 7 L. ed., 156.

So we say that not only the fullest consent to the taking and using of this deposition must be presumed from the manner of its taking; but there is express consent that it may be used upon the trial. The Supreme Court has plainly expressed its view of conduct less reprehensible than that disclosed by the record here. We quote:

"But it is obvious that all the provisions made in the statute respecting notice to the adverse

party, the oath of the witness, *the reasons for taking the deposition*, and the rank or character of the magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff in error did waive his rights under the Act of Congress—if he did practically consent that the deposition should be taken and returned to the court as it was—and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice, will take care that on the trial of every cause neither party shall reap any advantage from his own fraud.

“In this case it appeared to the court below as the record states, that Underwood was an aged man when his deposition was taken; that he had died before the trial; that one of the counsel for the defendant (now plaintiff in error) had accepted notice of taking the deposition; that he had attended at the taking, and cross-examined the witness; that he made no objection either to the sufficiency of the oath, to the reasons for taking the deposition, or to the competency of the magistrate; and, that, though the deposition had been filed in the record of the cause more than a year before the trial, no exception had been taken to

it in all that time. Under these circumstances, the consent of the defendant to the manner of taking the deposition must be presumed, or a fraudulent attempt to mislead the plaintiff must be conceded." *Shutte v. Thompson*, 82 U. S., 21 L. ed., 125 and 126.

We are, therefore, fully justified by the Supreme Court in all that we have said above.

#### THE LIABILITY OF THE VESSEL.

Under this head we shall answer all those parts of appellants' brief between pages 12 and 20, inclusive. The court found, on ample testimony, that—

"Instead of a split-pin which might be spread so that it would not slip out of the hole when the turnbuckle was turned, a nail was used . . . which slipped out of the hole when the head of the nail was brought to the lower side in turning the turnbuckle. This released the ring, and it in turn slipped off the hook, the hook opened, releasing the lashings, and the recoil of the lashings threw the libellant from the top of the lumber . . . There were no pins provided, and that it was consequently necessary to use nails."

This testimony follows:

#### APPELLEES' WITNESSES.

DUNWOODY—While they were pulling these chains together with a tackle I was down getting a stillson wrench; when I came back with the stillson wrench they had the two chains pulled together at that time (A. 106).

I stood back until the boatswain finished con-



necting the pelican hook and the other chain together, the port chain; then he told me to go ahead and set it up so I just reached down and got the stillson wrench and started to setting it up. I know who put the nail in there, the boatswain did. Everything was all connected when I started turning on the turnbuckle (A. 109). The next thing I was down in the hold (A. 110). I looked to see whether or not the pin had been inserted in the pelican hook and I saw a nail about 3 inches long, I should say, or  $2\frac{1}{2}$  inches. It was smaller than the nail I had seen used all the time. There is no way to fasten it; you just put it in there (A. 115). I did not see that the nail was loose. Some of those holes are larger in some of the pelican hooks. If you bend the nail the ring would slip over the end and the nail too; it would have to be straight to hold the link on there. The nails always staid in before, except a couple of times that I know of they slipped; but that was on a level deck load, there were no accidents or anything (A. 116). I saw the boatswain put the nail in (A. 118).

PFAUTSCH—A nail was put in the hole above the link. I saw the nail in there (A. 58). The nail was loose (A. 59). Dunwoody could not see whether that hole was such that the nail would drop out; that was behind him. He was working on that screw to tighten it up, to get in (it) together, tighten the chain together (A. 64). The nail was not in the hole when I went forward after the accident. It was gone (A. 60). I am not stating that I saw the nail in the pelican hook because a nail was always used. I saw the nail. I actually saw the nail myself (A. 61). After the accident I know the nail was gone. I am able to say right now that there was a nail put in there. I actually saw it myself (A. 62). When I got

there after the accident the nail was gone altogether. I didn't find it (A. 63).

DALLMAN—That is the hole ("N" on libelant's Exhibit 1, Dallman) where the split pin was supposed to be put in there; if we didn't have any we put in a nail (A. 72). I put a nail in there myself (A. 73). There should have been a split pin—there should have been some kind of a pin in there that could not fall out; a pin should come out like this to prevent it from falling out (the witness opens his two index (?) fingers to about an angle of 20 or 30 degrees) (A. 75, 76).

Lots of times that nail would go right in the hole until the head of the nail rested on the pelican hook, and all the strain would be only on one side of the nail, and the strain of that link would bend that nail and it would give way; it happened lots of times before that; it happened every time we put them on, that it slipped. The two trips I was on the ship it happened lots of times, every time we put them on, and got a little too much strain on them, the thing would slip, it would not hold (A. 76). The nail didn't fit; it was too small; we didn't have anything else. The hole was about, I should say  $\frac{3}{8}$  of an inch: the nail was about  $\frac{1}{4}$  of an inch (A. 75). There were some pins on board, but not for the turnbuckles (A. 81).

The end of this pelican hook came down toward the stock the way that is indicated by the line AB (on Libelant's Exhibit 1, Dallman). According to my experience with turnbuckles it should have had an upward slant (A. 78). The end where the ring went in (on?) went down instead of up (A. 82). Went down toward the stock of the turnbuckle. I say this: where the ring was slipped over, that the turnbuckle went down. I never saw a turnbuckle that slanted as much as this one did

down (A. 83). We had no split pins for use in that type of hook, because all the other turnbuckles I saw you don't need any nail at all; it would be safe without the nail, because they had an upward slant. I never worked with a turnbuckle with such a downward slant, and I never saw any other; that is the first time I put on a turnbuckle like that; I remember saying, "This ain't going to hold much." It kept on slipping all the time we put them on (A. 94).

Prior to the accident, I had conversation with the first officer of the "Colusa" in regard to her turnbuckles. The mate said that the turnbuckle should not be on the ship, because it was not safe (A. 78). I had a good many (of these conversations with the mate), and I told him about the turnbuckles, we ought not to put them on, they always slipped by themselves. He frequently said it was not fit to be there (A. 79).

There were two different brands (or makes) of turnbuckles on that ship (A. 90, 91).

#### APPELLANTS' WITNESSES.

CRIBBIN—I know the type of turnbuckle used on the "Colusa" (A. 121). There might have been one or two of the other type; that I would not swear to. My method of securing a turnbuckle is to tie it with a rope marline, or rope yarn, or something of that nature, and we never find any that will slip off (A. 125).

Q. THE COURT—When it does slip off there is something the matter with it then? A. Yes, your Honor, but we never found it to slip off.  
Q. I know, but I say, if it does slip off, it is because there is something wrong with it? A. Oh, yes (A. 125).

STREMMEL—*Direct.* Q. Do you know the type of turnbuckles used on the "Colusa"? A. Yes, sir, I do. Q. The type of turnbuckle that has a pelican hook that the link slips through and then a pin goes through the end of the hook? A. Well, I am not sure about the pin (A. 126).

Q. Is there more than one type of turnbuckle used on ships? A. Well, there may be; they are not all exactly alike. There may be minor little differences in the construction of a turnbuckle.

Q. Do you recall that you used any of this type of turnbuckle that has a hole through the end for the pin that the link slips over so as to hold the link from slipping off? A. I cannot remember whether I ever saw a hole in the end of the pin.

Q. The ones you saw, you never remember of seeing that hole used at all; is that the idea? A. No.

Q. What holds the link on? A. The strain on the turnbuckle.

Q. As I understand you, then, when the turnbuckle (A. 127) is screwed up and the strain comes onto the pelican hook, it, of itself, holds the link on? A. The more strain you get

on the chain, on the turnbuckle, the tighter the ring is on.

Q. How is the link kept on until you get the strain on the turnbuckle? A. It is slipped on and then the turnbuckle is set up.

Q. What is there to prevent its slipping off while you are setting up the turnbuckle? A. Nothing at all

(A. 128).

*Cross-Examination:* I have not paid particular attention to the turnbuckles on the "Colusa" (A. 130).

*Re-direct Examination:* MR. FORD—You have, though, seen turnbuckles with a hole in the end of the pin, haven't you? A. I don't know; I didn't pay any attention to them. In fact, I know there are turnbuckles that have not got holes.



Q. Most of them have not got holes? A. All the turnbuckles that I have seen, so far as I know, have not got any (A. 132).

From the above testimony the following facts could not be more clearly established:

1. This particular turnbuckle differed from the more common type of turnbuckle in having a hole in the end of the pelican hook;

2. It, also, differed most markedly from other turnbuckles that did have holes in the end of the pelican hooks in that, instead of the end of the pelican hook flaring outward or upward (something like a pig's nose), it curved inward or downward (like a sheep's nose);

3. That in the more usual type of turnbuckle the end of the pelican hook also flared outward or upward; so that the more strain that is put on the turnbuckle, the tighter the link over the pelican hook becomes;

4. Because of the downward curve of this pelican hook, a split pin was absolutely necessary for safety;

5. A nail was used instead, because there were no split pins, a nail that fitted loosely into the hole in the pelican hook;

6. That there could be no recoil or throw to the deck lashings, until after a strain had been brought upon them by setting up on the turnbuckle; and, even

upon appellants' theory, any strain upon the turnbuckle would, with a proper turnbuckle, only result in tightening the link. So, if the link had slipped off before the strain was brought, there would have been no recoil or throw;

7. The nail wasn't put in the end of an outflaring pelican hook of a standard or usual type of turnbuckle for additional security, as appellants suggest. It was put in the hole in the end of a particular pelican hook that curved the wrong way, and something that would not drop out was absolutely required in that hole;

8. It seems like nonsense to say that with a split pin in there the deck lashings could not be slipped in case of danger (App.'s Br. 30). Why couldn't a split pin be removed as easily as a tightly-fitting nail?

9. The nail was put into the hole immediately before the accident, and the turnbuckle was found by Pfautsch immediately after the accident, with the nail gone.

So all of appellants' challenges have been accepted and answered; and then considerably more.

The foregoing facts bring the case within the law making the vessel liable to an indemnity for injuries received by this seaman in consequence of a failure to supply and keep in order a proper appliance appurtenant to the ship (*The Osceola*, 189 U. S., 175).

## THE IN PERSONAM LIABILITY.

The owners are responsible *in personam*, of course, for all the negligence in regard to the failure to supply and keep in order the proper appliance appurtenant to the ship; but, in addition, they are also liable *in personam* for the negligence of the boatswain in placing in the hole a nail which could and did drop out and then directing the libelant to tighten the lashing. The boatswain, in the circumstances, was a seaman having command, within the meaning of Section 20, of the Act of March 4, 1915, known as the Seamen's Act.

We have quoted nothing at all from appellants' witness Bergsten, because the court below, on ample grounds, found against his testimony. The testimony of libelant's witnesses show that Bergsten was not near Dunwoody while the latter was setting up the turnbuckle and had nothing to do with directing him; that Bergsten was on the forecandle head occupied with getting up the anchor:

PFAUTSCH—The first officer was on the forecandle head heaving anchor (A. 58).

DALLMAN—The first officer was taking up the anchor, was on the forecandle head (A. 72). The first thing I saw, I heard the man (the mate) holler, "Go and get this man up," and the mate was standing on the after-part of the forecandle-head (A. 92).

**DUNWOODY**—While I was working with the stillson wrench nobody was with me there; I was there myself. The first mate was just coming off the forecastle head, he was in the eyes of the ship when I first stooped down to pick up the stillson wrench, and I raised up and I looked forward, and the first mate was just starting to walk aft. There was nobody there but myself when I started turning up this turnbuckle (A. 116, 117).

**THE BOATSWAIN GAVE LIBELANT THE ORDER TO SET UP THE LASHING AND DUNWOODY HAD TO OBEY.**

**PFAUTSCH**—The boatswain was in charge of the men in that group, of this work that we done, and he gave the orders to tighten up the deck lashings, to set up the deck lashings and tighten them up (A. 59).

**DALLMAN**—I was with Dunwoody at the time that the turnbuckle was put in place, I was in charge of the work. I was in charge of putting the lashing on. All of the sailors in the group or gang that were working there were under my authority. . . . I told Dunwoody to tighten up the turnbuckle and I went to the next lashing to put the tackles on there (A. 71, 72). I tell the men; they have to obey orders (A. 77). I was in charge of these men (A. 86).

**THE BOATSWAIN WAS A SEAMAN IN COMMAND.**

Dunwoody was under the boatswain's authority and had to obey his commands. That is the test imposed by the law. The vessel was getting under way or had just got under way in a foreign port, and dis-



obedience of this command would have meant prompt punishment for Dunwoody.

We have seen, as a matter of fact, that the mate did not have charge or command of this particular work, that he was occupied forward getting up the anchor.

In the matter of *Tonawanda Iron & Steel Co.* 234 Fed., 198, the accident happened Nov. 2, 1913 (p. 199), and the only question really involved was, Is the Seamen's Act (March 4, 1915) retroactive? The court there said (p. 201):

"(4) The maritime law at the time of the accident was in its application essentially different from the common and statutory law dealing with injuries to servants arising from the negligence of the master or fellow servants, and the adjudications already cited herein point out such differences with clearness and understanding. But it is contended that section 20 of the Seamen's Act, so called, passed by Congress on March 4, 1915 (38 Stat. 1185, c. 153), radically changed the existing maritime law as to the liability of the ship to seamen, in that it abolished the fellow servant doctrine by expressly providing:

"That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

"Was such act retroactive?"

The court held that it was not.

Also, it is stated by the court (p. 199) that the injured seaman testified "that he was ordered to take

in the slack of the line and trice it along the rail"; and that while obeying that order, he was injured. No question was raised as to the grade of the seaman giving the order. Also, "There was no evidence to support the view that the vessel was unseaworthy" (p. 200).

It is true that the Act does make the owners answerable for the negligence of the officers charged with the responsibility of the ship's navigation. It is equally true that the Act also makes the owners responsible for the negligence of any other seamen causing injury to a seaman under their authority and whose commands the injured seaman must obey.

The boatswain has always been an officer; and his acts, like the acts of any other member of the crew in doing ship's work, are acts in connection with the navigation of the vessel. The quartermaster on board the vessel is not a licensed officer. In grade he stands below the boatswain. But the quartermaster is, in a very special sense, usually charged with responsibility of the vessel's navigation. The same is true of the lookout. And certainly the boatswain, in securing the deckload for sea, is engaged in making the vessel seaworthy, and also, in a very special sense, responsible for the navigation of the vessel. But Section 20 of the Act was plainly intended to cover all cases where the injuries were caused by the negligence of a seaman whose orders the injured seaman had to obey because the injured seaman was under the authority

of the negligent seaman and had to obey the seaman entitled to give him the command. That such is the plainly expressed intention of the section appellants themselves would have made only too clear if they had quoted the opening part of Section 4,612, U. S. R. S., which they should have done, instead of only a part of it; also, they should not have omitted the quotation marks from the word "seaman" in the part they did quote. The pertinent part of the section reads as follows:

"Sec. 4612. In the construction of this Title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'";

The captain is a master seaman having command of the vessel and of every member of her crew; yet he is never particularly referred to, either in the language of the law or the language of the sea, as a "seaman" or as a "seaman having command": he is always the "Captain," or the "Master" or "A Master Mariner." By the law, all of the officers, except the master, and all other persons on board having command over those placed under their authority are designated as "seamen," just as the others who have no authority are seamen; and Section 4612, at the time Section 20 was enacted, so designated all of them, as

it designates them to-day. Also, Section 20 speaks of "seamen having command" of "those under their authority": that is, in the plural, of each person who is designated by the law as a "seaman."

Section 20, as a part of the Seamen's Act, became a part of that Title under the Revised Statutes of the United States dealing with "Seamen"; also, in the Seamen's Act, wherever the master alone is meant he is dealt with under the designation of "master" (U. S. R. S., Secs. 4516, 4529, 4530); that in dealing with licensed officers of vessels, the Revised Statutes deals with them under a separate head; that the use of the word "seamen" in the plural in Section 20 absolutely forces a construction that the word was meant to include "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board" of any vessel.

Prior to the enactment of Section 20, the question as to who were fellow servants in seamen's personal injury cases against the shipowner almost always, if not always, arose out of "matters connected with the navigation of the ship" (*The Troop*, 128 Fed., 858), or "in respect of the navigation and management of the vessel" (*The Osceola*, 189 U. S. 160). For example, in *The Osceola*, the accident was caused by the wind blowing down a derrick that was being used to hoist a gangway in place "in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock" (189 U. S., 159). The alleged



negligence was the giving of the order by the Master that the derrick should be used and the gangway hoisted while the vessel was underway. So, in a true sense, we may say that all ship's work done by the crew (whether running the engines, securing the deck-load or cooking for the crew) is "connected with the navigation of the ship"; but in doing such work, the persons doing it, usually are not "charged with the responsibilities of her (the ship's) navigation" in the limited sense of steering or directing her course; and the old rule was never considered from any such point of view. In fact, the language in *The Osceola* is express "that all members of the crew . . . are, as between themselves, fellow servants." On that basis alone, one wonders where the view expressed by appellants could have had its origin; but one is much more curious to know, in view of Section 4612, U. S. R. S., and the rule that Section 20 of the Act modified, by what canon of construction appellants justify the interpolation into Section 20 of the words "negligence of the officers charged with the responsibilities of her navigation."

Appellants seem to attach some importance to the fact that the boatswain took charge of the deck work as directed by the mate. But what difference can it make if the mate did give him orders? The master gives orders to the mate and to everybody else on board. The mate gives orders to the second mate and to everybody else on board, except the master; the

second mate gives orders to every one on board, except the mate and the master; and the boatswain gives orders to every one on board in the deck force below him. This was well known 300 years ago, as appears in the opening of *The Tempest*, where Shakespeare says, "Boatswain have care, speak to the mariners"; and that same boatswain might well have told the Illyrians on board, "I tell the men; they have to obey orders."

As we have seen, it does not matter whether or not the boatswain was an officer or whether or not he was charged with the responsibility of the navigation of the vessel; but we say that, most decidedly, he was an officer and, in securing the deckload for sea, was charged with responsibility for the navigation of the vessel.

In "*Jacobsen's Sea Laws*," a most ancient and eminent authority, it is said at page 123:

"The next officer to the mate on board, is the *boatswain*. He has the care of the *tackle* of the vessel," etc.

And that he is a seaman having command has been recognized by the Admiralty Court. We take the following extract from the case of *The Miami*, 87 Fed. 760:

"The boatswain had immediate charge of the work and the three sailors detailed to do it, and, in connection with such charge, was lending manual aid. The mate was superintending the work from a *somewhat higher post of command*."

Appellants seem to lay some stress on the fact that a boatswain is not a *licensed* officer; but licensed officers are comparatively new to the maritime law. For thousands of years ships were run by those who were not licensed officers; and to-day licenses are not even required in our own country for the master or any other officer on board of a sailing vessel of less than 700 tons gross and not carrying passengers; nor is a license required for any officer, except the master, on sailing vessels of more than 700 gross tons and not carrying passengers (U. S. R. S., 4438).

There is another aspect of this part of the case that we wish to present to the court. It appears in the numerous decisions construing similar state statutes. Of such a law of Pennsylvania, the C. C. A., 3rd Cir., said, in *Flickwir & Bush, Inc., v. Walkonen*, 238 Fed., 309:

"It sufficiently appears that the proofs tended to show that . . . his (the injured man's) duty was to conform to the orders of Oudine, the carpenter boss; that he was ordered by Oudine to stand on a certain brace in doing a certain piece of work; that he conformed to such orders, and by reason of said brace being unsupported by a cleat or tie rod it gave way and caused plaintiff's injuries; that the injury was caused by Oudine's negligence, whose duty it was to see the brace was secured; and that the proof that the brace was not supported at all, a lack which was patent on inspection, all united to bring the case within the Pennsylvania statute quoted, and afforded grounds from which the jury

could infer negligence on the part of the defendant."

This would certainly seem to cover the whole of libellant's case.

New York has a statute providing that the employer shall be liable for injuries caused "by reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence" (Labor Law, Sec. 200).

It is submitted that the meaning of that statute, like the one in Pennsylvania, is substantially the same as the one concerned in this case, "in command" being more of a maritime term and corresponding to the land expression "exercising superintendence."

That statute has been many times construed. In *Proctor & Gamble Co. v. Williams*, 106 C. C. A. 45, it was held (following the construction placed upon it by the state courts) that the purpose of the statute was to secure proper superintendence for all workmen; that it was not necessary that a person be formally authorized by the employer to be such a superintendent, but that the statute should be liberally construed to include all persons in the employ of the master having duties as foremen, superintendents and the like.

And in *Guilmartin v. Solway Process Co.*, 189 N. Y. 490, it was held that if the order which caused the injury was even a mere detail of the superintendent's work, the employer would be liable.



In *McHugh v. Manhattan R. Co.*, 179 N. Y. 378, it was held that a train dispatcher acts as a superintendent in sending out a train.

In *Cashmore v. Peerless Motor Car Co.*, 154 N. Y., App. Dis., 814, it was held that an employer is liable for the acts of a servant entrusted with authority to direct, control or command another employee in the discharge of his duty, no matter how limited that authority might be.

In *Markin v. Burke*, 212 Fed. 148, it was held that the negligence of a blasting foreman rendered the master liable.

The decisions of the State courts are pointed because, and only because, of the enactment of Section 20.

In respect of the facts here presented, *on this branch,* this case is the same as that of *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, except that in the last-mentioned case the action was at law and the injury was caused by the negligence of a fellow servant. In the *Quebec* case, the Supreme Court pointed out the well-known exception to the fellow-servant rule that the employer is liable "when the other servant occupies such a relation to the injured party, or to his employment, in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer." This court, in *Olson v. Navigation Co.*, 104 Fed. 576, while stating that the Olson case was to be determined by the rules of the

maritime law, said that in such a case *in personam* in the admiralty, the rule as to liability is the same as that announced in the *Quebec* case, and said further:

“Assuming, therefore, that the mere leaving open of the hatch, under the circumstances stated, can be properly held to have been negligence, it must necessarily have been the negligence of some officer or member of the crew of the ship. Assuming, further (for it is not so alleged) that it was the negligence of the captain, it was no more than negligence in the ordinary navigation ~~for~~<sup>of</sup> the ship, in which common employment all of the members of the ship’s company were engaged. . . . ‘The true inquiry,’ said Judge Wallace, ‘is whether the character of the act of the captain was one which it was incumbent upon the defendant (the owners) to see properly performed.’ . . . ‘The navigation of a ship from one port to another constitutes,’ as said by Judge Brown in the *City of Alexandria* (D. C.), 17 Fed. 390, ‘one common undertaking or employment, for which all of the ship’s company, in their several stations are alike employed. Each is in some way essential to the other in the furtherance of the common object, viz: the prosecution of the voyage.’” *Olson v. Or. Coal & Nav. Co.*, 104 Fed. 575 and 576.

Now, the whole point here is that Section 20 has placed the seamen-in-authority in the same category with “vice principals,” under that branch of law permitting recovery for the negligence of vice principals. This is made certain by what Justice Gray said in the case of the *A. Heaton*, 43 Fed. 595 and 596, which

opinion was rendered at a time before the "vice principal" rule had been disposed of in Federal Courts by the Supreme Court's ruling in the case of *Railroad Co. v. Conroy*, 175 U. S. 323. Justice Gray, in the *Heaton*, *supra*, said:

"No reason can be assigned why the owners of a vessel should be held less liable to a seaman for the negligence of the master in a court of admiralty than in a court of common law."

This court found Justice Gray's reasoning not applicable in the Olson case, because the captain had been, by the Conroy case, put in the "fellow servant" category in all that related to the navigation of the ship. And just there is the vital point: The negligence of the seaman-in-authority, when commanding another seaman, is the negligence of the employer, because the negligent seaman occupies such a relation to the injured party and to his employment as to make the negligence of such servant the negligence of the employer.

#### LIBELANT DID NOT ASSUME THE RISK.

The cases cited by appellants, under this head, have no application whatsoever to the facts here.

As to the cause of libel *in rem*, it is thoroughly well established by the Supreme Court in *The Osceola*, 189 U. S. 175, that the libelant is, of course, not entitled to an indemnity, unless the injuries were "in consequence of the unseaworthiness of the ship, or

“ a failure to supply and keep in order the proper appliances appurtenant to the ship” (*The Fullerton*, 167 Fed. 11). The trial court found, on uncontradicted testimony, that one of the causes of the injuries was a failure of the ship to supply and keep in order a proper appliance appurtenant to the ship. This court declared, in the case of *The Fullerton*, 167 Fed. 10 and 11, that in such a case as this the question of the assumption of risk did not enter; and summed the matter up thus, quoting with approval the language of the court below (p. 11):

“If the ship could not make proper preparations for sea, and chose to go to sea without them, it was a deliberate assumption by her of all risks and all damages which might result from such want of preparation, which would include all damages that the crew might suffer in the way of injury through such want of preparation.”

The cause of libel *in personam* includes the negligence alleged in the *in rem* cause, and counts, in addition, on the negligence of the boatswain. Of course, if the negligence *in rem* was proved, and we hold it unquestionably was, as the testimony was not even contradicted, then the negligence of the boatswain would not matter, either under the maritime law as it was before Section 20 was enacted, or under that law after its enactment; and this for the reason that if the employer was negligent, he is not released from liability if the negligence of a fellow servant also contributed to causing the injuries.



It is, therefore, only in the case that the negligence of the boatswain was the sole cause of the injury in this case, that Section 20 would come into play. The trial court found he was not the sole cause; and most assuredly he was not. But suppose, for argument's sake, he had been. Under that supposition, it is equally clear that the libelant would not have assumed the risk; for, in the name of common sense, what would be the good of giving with one hand to the seaman the right to recover for the negligence of one whose orders the seaman must obey and with the other taking that right away by saying that although he has to obey the order, he can't recover because he assumes the risk? That such risk is not assumed is apparent from the decisions on similar state statutes, *supra*; but, even in the admiralty before the enactment of Section 20, probably no case can be found where it is held that a seaman assumed the risk when he had to obey orders and *where he otherwise had a right of action*. For it must always be remembered that, prior to the enactment of Section 20, the seaman's right to recover an indemnity under the maritime law was limited to the case specified in *The Osceola*, *supra*.

Upon this question of the assumption of risk by the seaman, prior to the enactment of Section 20, we call the attention of the court to the following:

"A seaman on board ship has not the privilege of using his own judgment, or of quitting the ship's service if he apprehends danger, like an

ordinary workman on shore. If owners cannot be held as insurers of the appliances furnished to the ship for the safety of seamen, they ought, at least to be held to the strictest rule of diligence and care." *The Edith Godden*, 23 Fed. 44.

"It may be, as urged so strongly by the appellant, that the libellant received these appliances and proceeded to use them without objection, but, if this be so, it must be considered that on board ships a sailor is not expected to, nor, as for that matter, permitted, before executing an order, to question, the propriety of the order or the sufficiency of the materials furnished." *Wm. Johnson & Co. v. Johansen*, 86 Fed. Rep. 889.

"It is well settled that no such voluntary quality can be ascribed to their conduct in continuing to expose themselves to abnormal risks which come to their knowledge while their contract is being carried out. The rationale of this exception to the general rule is that they are bound by their shipping articles to strict obedience, that they are subject to severe penalties if they refuse to perform their duties, and that they have not the option, which landsmen are theoretically supposed to possess, of abandoning their employment the moment they are exposed to an abnormal risk." *Labbatt on Master and Servant*, Vol. 3, Sec. 1201.

"The seaman on the voyage has no alternative but to obey or suffer punishment. He cannot dissent from or abandon the service on account of the dangers or unreasonableness of the particular service required, as he might do in port, but must obey at any risk or hazard to himself; and yet he voluntarily incurs no risk, but acts upon the risk and responsibility of those whose lawful authority

demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own personal injury." *Thompson v. Herman*, 47 Wis., 608.

#### FAILURE TO PRODUCE TURNBUCKLE.

We thoroughly agree with appellants as to the importance of the turnbuckle in this case; but appellants do not pretend to make any real showing why the turnbuckle was not produced on the trial of the cause below. Appellants say (Br. 6), "At the time of the trial of this cause the 'Colusa' was at sea"; but they do not point out that she was in the port of San Francisco from Feb. 5 to Feb. 20, 1917 (the case was tried March 16, 1917), nor that she was in the same port in January, 1917. Their brief further says (p. 6), "Upon her next landing at this harbor a turnbuckle . . . was removed from the vessel, and an effort was made to submit it for the inspection of this court by way of additional proof. This application was denied, without prejudice to its renewal at the time of the hearing." If by "her next landing" is meant the next landing after the trial of the cause, we call the attention of the court to the fact that such next landing was on April 25 and while the cause was still under submission and undecided in the court below. If by "her next landing" is meant the landing during the latter part of September referred to in the affidavit of Mr. Ford in connection with the motion, then we want to point out that she

arrived here on Sept. 28, 1917, and this court met on Oct. 1, 1917, and that the motion was not renewed on Oct. 1st, nor has it ever been renewed, and there is now no motion to take additional proof before this court; and that it would be entirely unprecedented for such a motion to be made at the hearing or just before the hearing. Nor is it the fact that the denial of this motion was accompanied with permission to renew the motion "at the time of the hearing"; the denial was accompanied with permission to renew the motion, and the renewal should have been promptly made upon the coming in of this court, and appellants should not be permitted to attempt to "muss up" this case at this time of day.

But what we have already said is only the least part of appellants' offending in regard to this turnbuckle; and we turn now to the greater part.

It appears by the affidavit on file on behalf of the appellee, in answer to Mr. Ford's affidavit, that the "Colusa" was in Puget Sound during the latter part of December, 1916, and in San Francisco during 1917, as follows:

January 6-8; February 5-20; April 25 to May 4; July 13-21; September 28 to October 8.

That affidavit also shows that at the time the deposition of the mate was taken in December, 1916, Mr. Palmer, the proctor who took his testimony for appellant, showed affiant drawings of the turnbuckle and told affiant that he (Mr. Palmer) had made the



drawings from the turnbuckle. And on the trial of the cause, counsel for appellants stated to the court, "Mr. Palmer has a picture of it (the turnbuckle) that he drew" (A. 108).

Further than this, the record shows that when Dallman's deposition was taken December 29, 1916, about a week before the "Colusa" arrived in San Francisco, proctor for libelant made the following request:

"MR. WALL—Request is also made to produce the turnbuckle *before the trial* for identification. At this time I want the record to show that I request that Mr. Ford *produce it at the trial*" (A. 97).

Just before that, Mr. Ford had stated:

"Now, Mr. Wall, I will arrange, if we want Mr. Dallman's testimony further, if we conclude that there is danger of his not being here, to have him identify one of these turnbuckles—I will arrange to get him down here" (A. 96, 97).

Not a thing was done from December to the time of the trial of the case in March to produce the turnbuckle for any purpose. It was not produced at the trial in the court below, *nor was a particle of testimony taken to account for its non-production*; nor was its non-production accounted for in any way; nor was any effort made between the submission of the case on March 16th and its decision on May 14th following to account for the absence of the turnbuckle or to take any testimony in regard to it.

The note to Rule 7 of this court provides:

“Appearances cannot be entered unless counsel is a member of the bar of this court, . . . Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of this rule will not be considered by the court.”

Appellants' brief is signed with a firm name, a most eminent firm name; but we most respectfully submit that, under the well-recognized ruling, the firm is not a member of the bar of this court or qualified under the provisions of the rule. So that, in reality, there is no appearance here for appellants. And that is not surprising. It is easy to understand how any individual would, if we may be allowed to fall into the language of the street, desire to “pass the buck” in regard to the responsibility for the failure to produce this turnbuckle at the trial. Naturally such person would want to intrench himself behind the parapet of such a good, long firm name.

This court does not entertain motions, even when regularly made, to take additional proof, unless it is made to appear clearly that such testimony could not have been taken below. As this court says, “The practice of bolstering up a lost cause by additional testimony ought not to be encouraged” (117 Fed. 70). Here it appears clearly that the testimony could and should have been taken below; and appellants' attempt to bring the matter forward at this time seems only

a pretense to save them from the legal consequences of not having produced the turnbuckle at the trial, without the least showing why it was not produced then. Those consequences they must abide by. They are thus stated in the books:

"Is it not fair to presume that the claimant had knowledge of the real cause of the leak, and that its failure to show what the cause was is a strong circumstance tending to show that, if the truth had been disclosed, it would not have relieved the claimant upon any of the grounds of exemption from liability in the shipping receipts or bills of lading?

"In *Railway Co. v. Ellis*, 4 C. C. A. 454, 54 Fed. 481, 483, the court said:

"Now, it is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him; and the jury is justified in acting upon that conclusion. "It is certainly a maxim," said Lord Mansfield, "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." *Blatch v. Archer*, Cowp. 63, 65. It is said by Mr. Starkie, in his work on *Evidence* (volume I, p. 54): "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for

presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."'" *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed., pp. 198 and 199, C. C. A., 9th Cir.

"The production of weaker evidence, when stronger might have been produced, lays the producer open to suspicion that the stronger evidence would have been to his prejudice." *Runkle v. Burnham*, 153 U. S. 216, syllabus.

"The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U. S. 118, syllabus.

"The failure of a party to produce testimony within his knowledge and power on a material question involved in the case raises a presumption that the fact is against him." *Choctaw & M. R. Co. v. Newton*, 140 Fed. 225, syllabus.

"Where evidence is open to two interpretations, and it is within the exclusive power of one party to show what the truth is, the failure of such party to produce the evidence will authorize the jury to presume that, if produced, it would be unfavorable to him." *Robinson v. Union Cent. Life Ins. Co.*, 144 Fed. 1005, syllabus.

"If a party to a cause fails to produce evidence which in the opinion of the jury he could produce in support of his position if his testimony, which is contradicted, is true, the jury is justified in



drawing the inference from such omission, either that there is no such evidence that can be produced, or that if it was produced it would not be favorable to such party." *Murray v. Joseph*, 146 Fed. 260, syllabus.

"The failure of the claimants to call these two young men, and the explanation sought to account for this failure, are unsatisfactory, and do not dispel the presumption raised against the claimants, that the testimony of these witnesses, if produced, would have been unfavorable. This is a well-settled rule of evidence, not only in civil, but also in criminal, cases. As was well said by Lord Mansfield in *Blatch v. Archer*, Cowp. 63, 65:

"'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.'

"Mr. Starkie, in his work on *Evidence* (volume I, p. 54), thus lays down the rule:

"'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'

"See also, *Com. v. Webster*, 5 Cush. 295, 316; *People v. McWhorter*, 4 Barb. 438; *Railway Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481.

"In the last case it was held that the failure to produce an engineer as a witness to rebut the inferences raised by the circumstantial evidence would justify the jury in assuming that his evi-

dence, instead of rebutting such inferences, would support them." *The Joseph B. Thomas*, 81 Fed. p. 583.

If the particular turnbuckle had been produced, the end of the pelican hook would have curved downward and the hole in the end of the pelican hook would have been considerably larger in diameter than the diameter of a three penny nail.

It is respectfully submitted that the decree should be affirmed.

*J. R. Wall,*  
Proctor for Appellee.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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YEE CHEE SHIM,

Appellant,

vs.

EDWARD WHITE, as United States Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

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**Transcript of Record.**

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

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**Filed**

SEP 6 - 1917

**F. D. Monckton,**  
Clerk.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Errors on Appeal from District Court .....	14
Attorneys of Record, Names and Addresses of..	1
Bond Pending Determination of Appeal.....	19
Certificate of U. S. District Court to Transcript on Appeal .....	25
Citation on Appeal—Copy .....	18
Cost Bond on Appeal .....	21
Demurrer to Petition for Writ of Habeas Corpus .....	8
Names and Addresses of Attorneys of Record..	1
Notice of Appeal .....	17
Opinion and Order Sustaining Demurrer to and Denying Petition for a Writ of Habeas Corpus .....	10
Order Allowing Petition for Appeal .....	12
Order Extending Time to and Including August 15, 1917, to File Record and Docket Cause..	24
Order Extending Time to and Including September 15, 1917, to File Record and Docket Cause .....	25
Order Sustaining Demurrer to Petition for Writ .....	9
Order to Show Cause .....	7

Index.	Page
Petition for Appeal .....	11
Petition for Writ of Habeas Corpus.....	2
Praecipe for Transcript of Record.....	1
Stipulation and Order Transmitting Original Immigration Record .....	23



**Names and Addresses of Attorneys of Record.**

JOHN L. McNAB, Esq., and TIMOTHY HEALY,  
Esq., Attorneys for Petitioner and Appellant.  
U. S. ATTORNEY, Attorney for Respondent and  
Appellee.

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*In the United States District Court for the Northern  
District of California.*

No. 16,136.

In the Matter of the Petition of YEE CHEE SHIM,  
for Writ of Habeas Corpus.

**Praeceptum for Transcript of Record.**

To Walter Maling, Esq., Clerk of the United States  
District Court, San Francisco, California.

You will please prepare the record for transcript  
on appeal in the above-entitled action as follows:

1. Petition for writ of habeas corpus.
2. Demurrer to petition for writ of habeas corpus.
3. Minute order sustaining demurrer to petition for writ, and order dismissing the writ and remanding petitioner;
4. Petition for leave to appeal;
5. Order allowing appeal;
6. Assignment of errors;
7. Judge's opinion dismissing writ;
8. Notice of appeal;
9. Bond on appeal;
10. Citation on appeal;
11. Stipulation between counsel for petitioner

and United States attorney to the sending up of the Immigration record in the above-entitled case;

12. Order extending time to docket cause and file record;

13. Clerk's certificate to transcript of record.

J. L. McNAB,

Attorney for Petitioner.

[Endorsed]: Filed Jun. 29, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [1\*]

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*In the District Court of the United States, in and  
for the Northern District of California, First  
Division.*

(No. 16,136.)

In the Matter of the Application for Writ of Habeas  
Corpus on Behalf of YEE CHEE SHIM.

**Petition for Writ of Habeas Corpus.**

Your petitioner Chew Yee, being duly sworn on oath, deposes and says:

That he is the next friend and member of the family of Yee Chee Sim and makes this petition on behalf of said Yee Chee Shim. That said Yee Chee Shim is unlawfully imprisoned and restrained of his liberty by Edward White, Commissioner of Immigration in the City and County of San Francisco, in said District, under and by virtue of a warrant of deportation heretofore issued by the Secretary of Labor of the United States. That petitioner is unable to attach a copy of said warrant of deportation

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\*Page-number appearing at foot of page of original certified Transcript of Record.

for the reason that petitioner is informed by the said Edward White, Commissioner of Immigration, that the record in the case of the said Yee Chee Shim is in Arizona, and is not in the possession of the said Commissioner of Immigration in the City and County of San Francisco.

That petitioner has nevertheless ordered a copy of said warrant and all other papers in said record and will immediately on receipt thereof file the same in this court.

That said imprisonment and restraining of the liberty of the said Yee Chee Shim is unlawful in this:

I. That the said Secretary of Labor of the U. S. had no jurisdiction over the person of Yee Chee Shim and no jurisdiction or authority to issue said warrant.

II. That said Secretary of Labor exceeded his jurisdiction and authority in issuing said warrant of deportation. [2]

III. That said warrant of deportation is void in this: It fails to state any ground or reason for the arrest or deportation of said Yee Chee Shim and contains a mere general allegation that said Yee Chee Shim is a person unlawfully within the U. S. but sets forth no allegation or statement of fact in support thereof.

IV. That the said Yee Chee Shim was not given a fair and impartial trial and hearing by the Immigration Officials of the U. S. prior to the issuing of said warrant of deportation and upon which said warrant is purported to be based, all of which will more fully appear by the record of the testimony and

proceedings given and adduced at said hearing; which said record has been ordered by your petitioner and will be filed in this proceeding. That among other reasons why your petitioner was not given a fair and impartial trial and hearing in said matter your petitioner alleges as follows:

That all of the evidence taken on behalf of the Government at said hearing was produced by affidavits made by persons who did not appear at the hearing and that neither Yee Chee Shim or his attorney had any opportunity to be confronted by said witnesses or to cross-examine them, but said witnesses testified by making an affidavit, without the knowledge of the said Yee Chee Shim and without notice to him and without opportunity given to the said Yee Chee Shim or his attorney to cross-examine said witnesses or to know that said witnesses would be permitted to testify or to be called as witnesses.

V. That the said Yee Chee Shim is an alien of Chinese birth and belonging to the class of exempt aliens, to wit, a Chinese merchant who is actually residing within the United States as a *bona fide* merchant and has for a long time since resided within the United States as a *bona fide* merchant actually engaged at the time of his arrest as such a merchant and as such recognized by the U. S., [3] and said Yee Chee Shim asserts that he has a right to remain in the United States at the present time; that the hearing upon which the order of deportation was based was unfair in this:

That the said Yee Chee Shim was not permitted to cross-examine or be confronted with the witnesses



testifying for the Government but said witnesses were examined at the final hearing without the presence of the said Yee Chee Shim or his attorney and said evidence adduced at said hearing is wholly inadmissible and incompetent to prove that the said Yee Chee Shim was not a *bona fide* merchant, lawfully within the U. S. and said evidence taken at said hearing wholly failed to support or justify the order of deportation of said Yee Chee Shim.

Your petitioner further alleges that he has requested the preparation and production of the entire record in support of the foregoing facts and the entire record in said case but is informed by the Commissioner of Immigration at the City and County of San Francisco that said commissioner is unable to supply the same because the record is in Arizona. Your petitioner has ordered said record by telegraph and offered to pay for the making of the same and will immediately, on its receipt, produce the same in court in support of the allegations of this petition.

Your petitioner alleges that the Commissioner of Immigration in San Francisco intends to deport the said Yee Chee Shim to China by the vessel sailing December 22d and there is not sufficient time to procure the said record before that date.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued directed to said Edward White, Commissioner of Immigration at San Francisco, California, in order that the cause of detention of said Yee Chee Shim may be inquired into and that

in the meantime the deportation of said Yee Chee Shim be stayed.

J. L. McNAB and  
TIMOTHY HEALY,  
Attorneys for Petitioner. [4]

State of California,  
City and County of San Francisco,  
Northern District of California,—ss.

CHEW YEE, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he has heard read the said petition and knows the contents thereof and that the same is true of his own knowledge and belief, except as to those matters which are therein stated on information and belief and as to those matters he believes it to be true.

(Chinese Characters.) CHEW YEE.

Subscribed and sworn to before me this 21st day of December, 1916.

[Seal] J. D. BROWN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Chew Yee, being unable to speak English fluently, I swore T. J. Gintgee to act as interpreter and to well and truly translate from the English language into Chinese and Chinese into English.

[Seal] J. D. BROWN,  
Notary Public.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [5]

*In the District Court of the United States, in and  
for the Northern District of California, First  
Division.*

In the Matter of the Application for Writ of Habeas  
Corpus on Behalf of YEE CHEE SHIM.

**Order to Show Cause.**

Upon consideration of the petition filed in the  
above-entitled cause it is ordered that the respondent,  
the Commissioner of Immigration at the port of San  
Francisco show cause in this court, in the courtroom  
thereof in the city and county of San Francisco, at  
10 o'clock A. M. on the 6 day of January, 1917, why  
the writ of habeas corpus should not issue as  
prayed for by the petitioner herein.

Let a copy of this order be served forthwith upon  
said respondent and upon the U. S. Attorney, for this  
district, and it is,

FURTHER ORDERED that deportation of said  
Yee Chee Shim be and the same is hereby stayed un-  
til further order of this Court.

Dated December 21st, 1916.

M. T. DOOLING,  
Judge of the District Court.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [6]

*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

No. 16,136.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEE CHEE SHIM.

**Demurrer to Petition for Writ of Habeas Corpus.**

Now comes the respondent, Edward White, Commissioner of Immigration at the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges :

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon ;

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,

United States Attorney,

CASPER A. ORNBAUN,

Asst. United States Attorney,

Attorneys for Respondent.



[Endorsed]: Filed Jan. 20, 1917. W. B. Maling,  
Clerk. By Lyle S. Morris, Deputy Clerk. [7]

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At a stated term of the District Court of the United States, for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the 12th day of April, in the year of our Lord one thousand nine hundred and seventeen. Present, the Honorable MAURICE T. DOOLING, Judge.

No. 16,136.

In the Matter of YEE CHEE SHIM, on Habeas Corpus.

**(Order Sustaining Demurrer to Petition for Writ.)**

Pursuant to opinion this day filed, it is ordered that the demurrer to the petition for a writ of habeas corpus heretofore submitted herein be, and the same is hereby sustained and said petition denied accordingly. [8]

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*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

No. 16,136.

In the Matter of YEE CHEE SHIM, on Habeas Corpus.

**(Opinion and Order Sustaining Demurrer to and Denying Petition for a Writ of Habeas Corpus.)**

JOHN L. McNAB, Esq., and TIMOTHY HEALY, Esq., Attorneys for Petitioner.

JOHN W. PRESTON, Esq., United States Attorney, and CASPER A. ORNBAUN, Esq., Assistant United States Attorney, Attorneys for Respondent.

The petitioner here having confessedly arrived in this country within three years there is no doubt of the jurisdiction of the Department of Labor over his case. This being so the question is not present here that was passed on by the Court in the case of Owe Sam Goon, 230 Fed. 654, where the Court held that "Where the jurisdiction of the department depends upon the establishment of a certain fact, which fact, when established, takes the alien's case out of the jurisdiction of the courts of the United States where it is placed by the Chinese Exclusion Law, the Court is entitled to regard, not perhaps the weight of the evidence, but certainly the character of the evidence by which such transfer of jurisdiction is effected."

The use of affidavits where the jurisdiction of the department is not in question has been frequently upheld. I do not feel justified in holding otherwise at this late date.

The demurrer to the petition will therefore be sustained [9] and the petition itself denied.

April 12th, 1917.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Apr. 12, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [10]

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*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

No. 16,136.

In the Matter of YEE CHEE SHIM, on Habeas Corpus.

**Petition for Appeal.**

Now comes Yee Chee Shim, defendant and appellant herein, and says:

That on the 12th day of April, 1917, the above-entitled Court made and entered its judgment and order dismissing the petition of defendant for a writ of habeas corpus and affirming the judgment of the commissioner ordering he defendant deported, in which said judgment and order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which are more fully appealed from in the assignment of errors filed herein.

Therefore this appellant prays that an appeal may be granted in his behalf to the U. S. Circuit Court of Appeals for the Ninth Circuit thereof, for the correction of the errors so complained of, and to reverse, annul and set aside the said order and judgment made and entered in the premises on the 12th day of April, 1917; and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe duly authenticated, may be sent and transmitted to the U. S. Circuit

Court of Appeals for the Ninth Circuit thereof.

Dated San Francisco, May 6, 1917.

J. L. McNAB,

Attorney for Defendant and Appellant. [11]

Service of the within petition for appeal is hereby admitted this 7th day of May, 1917.

JOHN W. PRESTON,

U. S. Attorney, Atty. for Respondent.

[Endorsed]: Filed May 7, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [12]

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*In the Southern Division of the United States District Court, for the Northern District of California, First Division.*

No. 16,136.

In the Matter of YEE CHEE SHIM, on Habeas Corpus.

**Order Allowing Petition for Appeal.**

On this 7th day of May, 1917, came Yee Chee Shim, defendant herein, by his attorney John L. McNab, and having previously filed herein and presented to this Court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment and order herein was rendered, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other



and further proceedings may be had in the premises as may seem proper.

On Consideration Whereof, the Court hereby allows the appeal hereby prayed for, and orders that the said defendant Yee Chee Shim be admitted to bail pending said appeal in the sum of three thousand (\$3,000) dollars, conditioned as the law directs;

AND IT IS HEREBY FURTHER ORDERED that upon said defendant giving such bail in the aforesaid amount of \$3,000 he may, upon surrendering himself and executing a new bond in the sum of \$3,000, apply to have his sureties on the present bond duly exonerated.

AND IT IS FURTHER ORDERED that upon said defendant giving [13] such bond in the aforesaid amount of \$3,000, execution and remand and all proceedings on said judgment hereby appealed from and all proceedings for deportation on the order of the U. S. Commissioner be, and the same are hereby stayed during the pendency of the appeal taken herein, provided that said appeal be docketed in the Circuit Court of Appeals in the October term and that said defendant do not depart the jurisdiction of the said Circuit Court of Appeals but remain and abide by whatever judgment shall finally be entered herein.

AND IT IS HEREBY FURTHER ORDERED that the bond for costs be the same as hereby fixed in the sum of \$100.

M. T. DOOLING,  
United States District Judge.

Dated San Francisco, May 7th, 1917.

Service of the within order allowing petition for appeal is hereby admitted this 7th day of May, 1917.

JOHN W. PRESTON,

U. S. Atty.,

Atty. for Respondent.

[Endorsed]: Filed May 7, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

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*In the Southern Division of the United States District Court, for the Northern District of California, First Division.*

No. 16,136.

In the Matter of YEE CHEE SHIM, on Habeas Corpus.

**Assignment of Errors on Appeal from District Court.**

Now comes Yee Chee Shim, appellant herein, by his attorney John L. McNab, in connection with his petition for an appeal, and assigns the following errors, which he avers occurred at the hearing of the above-entitled cause and upon which he will rely on appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit, to wit:

I.

The District Court erred in holding and deciding that the petitioner was within the jurisdiction of the Department of Labor and that said Department of Labor had the power to deport appellant.

II.

The District Court erred in holding and deciding that the entry of petitioner on his return to America, after prior departure within three years, gave exclusive jurisdiction to the Department of Labor over appellant.

III.

The District Court erred in deciding and holding that petitioner having entered within three years, the United States District Court was without jurisdiction to extend relief on habeas corpus.

IV.

The District Court erred in holding and deciding that there was a fair hearing in the petitioner's case.  
[15]

V.

The District Court erred in holding and determining that the use of *ex parte* affidavits, without the presence of defendant and without opportunity on his part to be present and cross-examine witnesses, was lawful.

VI.

The District Court erred in holding and determining that the immigration officers had the right to use *ex parte* affidavits to afford evidence on which to deport defendant and petitioner.

VII.

The District Court erred in holding and determining any officer charged with the deportation of defendant and appellant had the right to consider *ex parte* affidavits taken without notice to the applicant.

## VIII.

The District Court erred in sustaining the demurrer to the petition and denying the petition for all the reasons set forth in assignments I to VII inclusive.

## IX.

The District Court erred in holding and determining that the Immigration Authorities had the power, by the use of *ex parte* affidavits and under the facts shown, to deport the defendant and appellant.

WHEREFORE, the appellant prays that the judgment and order of the United States District Court in and for the Southern Division, Northern District thereof, First Division, made and entered herein in the office of the clerk of said court on the 12th day of April, 1917, affirming the judgment of the Commissioner, [16] and ordering defendant deported, be reversed, and the cause remanded, with instructions to discharge defendant from custody.

Dated San Francisco, California, this 6th day of May, 1917.

J. L. McNAB,

Attorney for Defendant and Appellant.

Service of the within assignment of errors on appeal from District Court is hereby admitted this 7th day of May, 1917.

JOHN W. PRESTON,

U. S. Attorney,

Atty. for Respondent.

[Endorsed]: Filed May 7, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [17]



*In the Southern Division of the United States District Court, for the Northern District of California, First Division.*

No. 16,136.

In the Matter of YEE CHEE SHIM, on Habeas Corpus.

**Notice of Appeal.**

To the clerk of the above-entitled court and to the Honorable John W. Preston, United States Attorney for the Northern District of California:

You and each of you will please take notice that Yee Chee Shim defendant herein, does hereby appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit from the judgment and order made and entered herein on the 12th day of April, 1917, refusing to discharge the defendant and appellant and affirming the judgment of the United States Commissioner, ordering the defendant herein deported.

J. L. McNAB,

Attorney for Defendant and Appellant.

Dated San Francisco, California, May 14<sup>nd</sup>, 1917.

Service of the within notice of appeal is hereby admitted this 7th day of May, 1917.

JOHN W. PRESTON,

U. S. Atty.,

Atty. for Respondent.

[Endorsed]: Filed May 7, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

**(Citation on Appeal—Copy.)**

United States of America,—ss.

The President of the United States, to Edward White, U. S. Commissioner of Immigration and John W. Preston, United States District Attorney for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, wherein Yee Chee Shim, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 7th day of May, A. D. 1917.

M. T. DOOLING,

United States District Judge.

Service of within by receipt of copy admitted this 7th day of May, 1917.

JNO. W. PRESTON,

U. S. Atty.,

Atty. for Respondent.

[Endorsed]: Filed May 7, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

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(CHINESE PICTURE.)

*In the Southern Division, District Court of the United States for the Northern District of California, First Division.*

#16,136.

In the Matter of YEE CHEE SHIM, on Habeas Corpus.

**Bond Pending Determination of Appeal.**

BE IT REMEMBERED, that on this 8th day of May, 1917, before the undersigned, a United States Commisioner, duly appointed by the District Court of the United States, Southern Division, Northern District of California, to take acknowledgments of bail, etc. depending in the courts of the United States, pursuant to the Acts of Congress in that behalf, personally appeared Yee Chee Shim, as principal, and the National Surety Company, organized and existing under the laws of the State of New York, authorized to become sole surety on bonds, undertakings, etc., as surety, and jointly and severally acknowledged themselves to be indebted to the United States of America in the sum of Three Thousand Dollars (\$3,000), lawful money of the United States, to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States of America.

The condition of the above recognizance is such

that, whereas, the Southern Division, District Court of the United States for the Northern District of California, First Division, in the matter pending in said court and in which a writ of habeas corpus was applied for on behalf of the said principal, did on the 12th day of April, 1917, make its order sustaining a demurrer to said petition and further ordered that said petition be denied and that the said petitioner be remanded; and whereas said court did on the 7th day of May, 1917 make its order that pending the determination of an appeal to the United States Circuit Court of Appeals for the Ninth [20] Circuit from said order, that said principal be released upon bond in the penal sum of Three Thousand Dollars (\$3,000);

NOW THEREFORE, if the said Yee Chee Shim, shall personally appear at the Southern Division, District Court of the United States for the Northern District of California, and the United States Circuit Court of Appeals for the Ninth Circuit, at any and all times or time he may be required to answer and render himself amenable to any and all further orders and processes in the premises, and not depart from the said courts without leave first obtained, and if ordered remanded into the custody whence taken, will surrender himself in execution thereof, then this recognizance shall be void, otherwise to remain in full effect and virtue.

YEE CHEE SHIM. (Seal)

[Seal] NATIONAL SURETY COMPANY.

By FRANK L. GILBERT,

Its Attorney in Fact.



Taken and acknowledged before me this 8th day of May, 1917.

[Seal]

FRANCIS KRULL,  
United States Commissioner for the Northern District of California at San Francisco.

Form of bond approved.

CASPER A. ORNBAUN,  
Assistant U. S. Attorney.

[Endorsed]: Filed May 8, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

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*In the Southern Division, District Court of the  
United States for the Northern District of California,  
First Division.*

No. 16,136.

In the Matter of YEE CHEE SHIM, on Habeas  
Corpus.

**Cost Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Yee Chee Shim, as principal, and the National Surety Company, a New York corporation, having its principal place of business at the city of New York, New York, authorized under the provisions of act of Congress approved August 13, 1894, as amended by the Act of Congress approved March 23, 1910, to become sole surety upon recognizances, stipulations, bonds and undertakings, and licensed by the State of California, as sole surety, are held and firmly bound unto the United States of America in the full and just sum of One Hundred Dollars (\$100), to be paid to the United States of America, its certain

attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of May in the year of our Lord one thousand nine hundred and seventeen.

WHEREAS lately at a Southern Division, District Court of the United States for the Northern District of California, First Division, in a matter depending in said court, on petition for a writ of habeas corpus in behalf of said principal, a judgment and order was rendered by the said Court sustaining the demurrer to the said petition for writ of habeas corpus, denying the said petition and remanding the petitioner, and the said petitioner having obtained an order allowing an appeal to reverse the said judgment and order [22] in the aforesaid matter and a citation directed to the United States Attorney citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California; and

NOW, THEREFORE, the condition of the above obligation is such, that if the said Yee Chee Shim shall prosecute his appeal to effect, and answer all damages and costs if he fail to make good his plea,

then the above obligation to be void, else to remain in full force and virtue.

YEE CHEE SHIM. (Seal)

[Seal]

NATIONAL SURETY COMPANY.

By FRANK L. GILBERT,

Its Attorney in Fact.

Taken and acknowledged before me this 8th day of May, 1917.

[Commissioner's Seal.] FRANCIS KRULL.

[Endorsed]: Filed May 8, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23]

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*In the United States District Court in and for the Northern District of California.*

No. 16,136.

In the Matter of the Petition of YEE CHEE SHIM,  
for Writ of Habeas Corpus.

**(Stipulation and Order Transmitting Original Immigration Record.)**

IT IS HEREBY STIPULATED in the above-entitled cause that the clerk of the District Court may transmit to the Court of Appeals on appeal in the above-entitled action, the original record used in the above-entitled cause as prepared by the Immigration Department, consisting of the warrant of arrest, testimony and proceedings had before the Immigration Inspector, and order for deportation of the Immigration Department, without the necessity

of incorporating the same in the printed transcript of record on appeal.

JNO. W. PRESTON,  
U. S. Attorney.  
J. L. McNAB,  
Attorney for Appellant.

Let order be made accordingly.

WM. H. HUNT,  
Judge.

[Endorsed]: Filed Jun. 29, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

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*In the United States District Court in and for the  
Northern District of California.*

No. 16,136.

In the Matter of the Petition of YEE CHEE SHIM,  
for Writ of Habeas Corpus.

**Order Extending Time to and Including August 15,  
1917, to File Record and Docket Cause.**

GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the time within which the appellant in the above-entitled cause may file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is extended to and including the fifteenth day of August, 1917.

Dated San Francisco, June 22, 1917.

M. T. DOOLING,  
District Judge.



[Endorsed]: Filed Jun. 23, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

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*In the United States District Court in and for the  
Northern District of California.*

No. 16,136.

In the Matter of the Petition of YEE CHEE SHIM,  
for Writ of Habeas Corpus.

Order Extending Time to and Including September  
15, 1917, to File Record and Docket Cause.

GOOD CAUSE APPEARING THEREFOR, it is  
hereby ordered that the time within which the ap-  
pellant in the above-entitled cause may file the  
record on appeal and docket the cause in the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, be and the same hereby is extended to and  
including the fifteenth day of September, 1917.

Dated San Francisco, August 14th, 1917.

WM. H. HUNT,

District Judge.

[Endorsed]: Filed Aug. 15, 1917. W. B. Maling,  
Clerk. By C. M. Taylor, Deputy Clerk. [26]

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Certificate of U. S. District Court to Transcript on  
Appeal.

I, Walter B. Maling, Clerk of the District Court  
of the United States, for the Northern District of  
California, do hereby certify the foregoing 26 pages,  
numbered from 1 to 26, inclusive, to contain a full,  
true, and correct transcript of certain records and

proceedings, in the matter of Yee Chee Shim, on Habeas Corpus, No. 16,136, as the same now remain on file and of record in office of the Clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "Praeceptum for Record" (a copy of which is embodied in this transcript), and the instructions of the Attorneys for petitioner and appellant herein.

I further certify that the cost for preparing and certifying to the foregoing transcript on appeal is the sum of Eight Dollars and Sixty-five Cents (\$8.65) and that the same has been paid to me by the Attorneys for Appellant herein.

Annexed hereto is the original Citation on Appeal, issued herein, page 28.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of August, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk.

CMT. [27]

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**(Citation on Appeal—Original.)**

UNITED STATES OF AMERICA,—ss:

The President of the United States, To EDWARD WHITE, U. S. Commissioner of Immigration, and JOHN W. PRESTON, United States District Attorney for the Northern District of California, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Yee Chee Shim, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 7th day of May, A. D. 1917.

M. T. DOOLING,

United States District Judge. [28]

Service of within by receipt of copy admitted this 7th day of May, 1917.

JNO. W. PRESTON,

U. S. Atty.,

Atty. for Respondent.

[Endorsed]: No. 16,163. United States District Court for the Northern District of California, First Division. Yee Chee Shim, Appellant, vs. Edward White, Com. and John W. Preston, U. S. Atty. Citation on Appeal. Filed May 7, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3044. United States Circuit Court of Appeals for the Ninth Circuit. Yee Chee Shim, Appellant, vs. Edward White, as United States Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 30, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

YEE CHEE SHIM,

*Appellant,*

VS.

EDWARD WHITE, as United States  
Commissioner of Immigration at the  
Port of San Francisco, California,

*Appellee.*

## APPELLANT'S OPENING BRIEF.

JOHN L. McNAB,  
BYRON COLEMAN,  
Attorneys for Appellant.

*Filed this.....day of February, A. D. 1918.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.



No. 3044.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

YEE CHEE SHIM,

*Appellant,*

vs.

EDWARD WHITE, as United States  
Commissioner of Immigration at the  
Port of San Francisco, California,

*Appellee.*

### APPELLANT'S OPENING BRIEF.

In the District Court the petition of Chew Yee on application for writ of habeas corpus on behalf of Yee Chee Shim, the appellant, was filed on the 21st day of December, 1916. The petition alleges that a warrant for the deportation of the appellant was issued by the Secretary of Labor of the United States, after the appellant had been wrongfully imprisoned and restrained of his liberty by the appellee, who is the Commissioner of Immigration, in the City and County of San Francisco and in the district in which the petition was filed.

It is contended in the petition that the imprisonment and restraint upon the liberty of the appellant was unlawful for the reason that the Secretary of

Labor had no jurisdiction over him or authority to issue the warrant and had no jurisdiction and authority to issue the warrant and exceeded his jurisdiction and authority in issuing the warrant of deportation.

It is further contended that the appellant was not given a fair and impartial trial and hearing for the reason that all of the evidence on behalf of the Government was produced by affidavits; and that appellant had no opportunity to exercise the right of confrontation or to cross-examine the witnesses.

It is further alleged that the appellant was lawfully within the United States and belonged to one of the classes of Chinese persons exempt under the Chinese Exclusion Act, or in other words that the appellant was a Chinese merchant, residing within the United States and who for a long time prior to his arrest resided in the United States as a bona fide merchant and actually engaged in the pursuit of his business as such merchant at the time of his arrest.

The record of the United States Department of Labor containing the testimony and showing the nature of the evidence and the circumstances under which it was obtained, although not incorporated in the transcript on this appeal, is before this Court, being Respondent's Exhibits A and B in the custody of the clerk.

A demurrer on behalf of the appellee Edward White, Commissioner of Immigration, was interposed and eventually on the 12th day of April, 1917, the District Court sustained the demurrer and ruled that



the petition be denied. From the opinion and order sustaining the demurrer and denying the petition for the writ of habeas corpus, this appeal has been taken.

There is no dispute as to the following facts:

The appellant is not accused by the Commissioner of Immigration or the Department of Labor with having violated the provisions of any statute or law of the United States except the Chinese Exclusion Act of 1888. There is nowhere any contention that he is within the United States in violation of the Act of February 20, 1907, and the amendments thereto, known as the General Immigration Act. If he is liable to deportation at all the appellee admits that it is for a violation of the Chinese Exclusion Laws.

In the warrant issued by the Secretary of Labor for the arrest of the appellant (see the exhibit on file) he is ordered taken into custody for the following reason:

“That he re-entered the United States in violation of Sec. 7 Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section; and that he has been found within the United States in violation of Sec. 2 Chinese Exclusion Act of November 3, 1893, having secured admission by fraud, not having been at time of entry a lawfully domiciled exempt returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country.”

The application for the warrant of arrest forwarded to the Secretary of Labor by the inspector in charge recommends the issuance of the warrant for the following reasons:

"The person above named is an alien, native citizen of China. He first came to the United States on SS Mongolia, arriving at the port of San Francisco April 23, 1909, and was landed as the minor son of a merchant. Following pre-investigation as a merchant, member of Wah Yuen Co., of Oxnard, California, he departed from San Francisco for China on SS Siberia November 11, 1913. Returning to the same port on SS Mongolia October 27, 1915, he was re-admitted as a merchant. He is now unlawfully within the United States and subject to deportation under the provision of section 21 of the Immigration Act for the following, among other reasons, to-wit: That he re-entered the United States in violation of section 7 Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section; further, he has been found within the United States in violation of section 2 Chinese Exclusion Act of November 3, 1893, having secured admission by fraud, not having been at the time of entry a lawfully domiciled exempt returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country. To substantiate these allegations, there are attached hereto and made a part hereof San Francisco landing record in the case of Yee Chee Shim, No. 14776/13-3 (Exhibit A); statements of Mrs. Virginia M. Rice, Severino Andreoli, John A. Thompson and G. R. Bellah to Inspector Bernard 6/24/16 (Exhibit B); letters addressed to the inspector in charge at Los Angeles by Immigration Inspector A. G. Bernard June 20, 1915, and the enclosures therein mentioned, consisting of partnership list of Wah Yuen Co., statement of Fred C. Duckham, and statement of Joseph R. Langley, all of which are marked 'Exhibit C'.

"The San Francisco landing record in the case

takes the place of verification of landing Form 505.

"Authority requested for expenses of officer and alien in conveyance from Phoenix, Arizona, to Tucson for hearing, and it is requested that bail bond be fixed at \$2,000.00."

There is no allegation or evidence that the appellant entered the country surreptitiously or that he entered it save through a regular port of entry or that he entered in violation of any law, except the Chinese Exclusion Laws. The sole reason for the order of deportation appears to be that he misrepresented that he was a merchant, whereas the records of the Department of Labor show him not to be of this exempt class. There is only one question of law involved, and that is that the Secretary of Labor had no jurisdiction to arrest and deport the appellant on the sole ground that he was found in this country in violation of the Chinese Exclusion Laws. Deportation can only be ordered by a United States Commissioner or a U. S. District Court.

In view of the fact that on January 28, 1918, the Supreme Court of the United States ruled upon the precise point involved in this case and held that in actions of this character the Department of Labor has no jurisdiction, we deem it only necessary to advert briefly to this decision of the Supreme Court and one or two District Court decisions preceding said decision, in order to conclusively demonstrate the error in the ruling of the District Court.

*United States et al. v. Woo Jan*, No. 586—  
October Term, 1917, U. S. Supreme Court,  
decided January 28, 1918.

It is not denied that prior to the conclusive settlement of the question by the recent ruling of the Supreme Court, there was some conflict of authority. In fact the weight of authority seemed to favor the proposition that the Secretary of Labor had jurisdiction. In the face of this authority, however, and in spite of it, one or two of the Federal Judges were bold enough to vigorously dissent; one of them, Judge Cochrane, writing a very careful, elaborate and well reasoned opinion in the case of *Ex Parte Woo Jan*, 228 Fed. 927. It was this case that the Circuit Court of Appeals for the 6th Circuit certified up to the Supreme Court because of the uncertainty and doubt that clouded the issue and that the Supreme Court decided in favor of the contention of Judge Cochrane in the District Court.

It is only necessary to state that in every respect the instant case is an exact parallel of the *Woo Jan* case. In both cases a petition for writ of *habeas corpus* was filed. In both a demurrer to the petition was sustained. In both, the sole question at issue was the jurisdiction of the Secretary of Labor over the deportation of Chinese persons where the sole ground for deportation was an alleged violation of the Chinese exclusion laws. In *United States v. Woo Jan*, the Circuit Court of Appeals certified to the Supreme Court the two following questions:

“(a) Has the Secretary of Labor acting within three years from the last entry, jurisdiction to arrest and deport a Chinese alien upon the sole ground that he is found in this country in violation of the Chinese exclusion act?



“(b) Are the facts stated in Woo Jan’s petition and admitted by demurrer inconsistent with any jurisdiction in the Department of Labor to cause his arrest and deportation?”

The Supreme Court’s answer to “(a)” was no, and to “(b)” yes. It follows that the same answer must be given in the case at bar.

Before closing this brief, we wish to dwell for a moment only, upon the right of the appellant to a fair and impartial trial before the Commissioner of Immigration. In view of the decision of the Supreme Court in *U. S. v. Woo Jan*, the question as a matter of fact becomes academic, but we wish to call attention to the case of *Backus v. Owe Sam Loon*, 235 Fed. 847, as authority for the proposition that the character of the evidence adduced on the hearing of the case of Yee Chee Shim was not such as to warrant the order of deportation of the Department of Labor, even assuming that it had jurisdiction.

Respectfully submitted,

JOHN L. McNAB,

BYRON COLEMAN,

Attorneys for Appellant.



No. 3046.

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United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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William B. Edwards,

*Appellants,*

*vs.*

Patrick Bodkin,

*Appellee.*

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BRIEF OF APPELLEE.

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DUKE STONE,

*Attorney for Appellee.*

FILED  
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BRIEF OF APPELLEE.

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STATEMENT.

This is an attempted appeal by appellant from a judgment of the United States District Court at Los Angeles, Honorable Benjamin F. Bledsoe presiding, sustaining a demurrer to the amended complaint, without leave to amend. The amended complaint is a long, confusing recital of the vicissitudes of the appellant in losing his contest before the various land departments of the government over a period of years and an

attack made upon the decisions of the land office for the purpose of having it held that appellee's patent heretofore issued by the government at the conclusion of all the contests should be cancelled and a patent issued to appellant.

### **First Proposition.**

The appeal should be dismissed for the failure of appellant in the following particulars:

1. A failure to comply with section (1) of rule XXIV as amended March 29, 1916, by this Honorable Court, in that no printed brief has been served and filed as required by that rule, and further, that no concise, abstract statement of the case is presented in any brief by appellant, and in that no specification of errors relied upon are stated as required by said rule and the subdivisions thereof.

2. No citation has been issued and served in this case as shown by the records and files of this cause.

A reference to the record in this cause will show the failure of appellant to comply with the rules of this Honorable Court in the above particulars; and the record presented, being unintelligible on its face, should be dismissed by this Honorable Court.

### **Second Proposition.**

The action of the court in sustaining the demurrer without leave to amend was right.

In this connection we call attention to the opinion of the United States District Court at Los Angeles, rendered on the dismissal of the complaint, and which is

reported in 241 Fed. R. 931, and which, omitting formal parts, is as follows:

“By amended bill of complaint in equity plaintiff alleges, among other things, that on July 17th, 1902, the Secretary of the Interior, under the ‘second form’ of withdrawal under the ‘Reclamation Act’ of June 17th, 1902, withdrew a certain quarter section lying along the Colorado River in California. On the 1st of December following plaintiff made a homestead entry of said land. Thereafter, in September, 1903, the Secretary of the Interior made a ‘first form’ withdrawal of the quarter section above referred to.

In 1905 the Department of the Interior promulgated certain regulations respecting withdrawals under the Reclamation Act (33 L. D. 607), providing for the entertaining of contests as to lands withdrawn pursuant to either form of withdrawal under the Reclamation Act and also providing that the preferred right of a successful contestant under the Statute of 1880 (21 Stat. 140) would be held to attach at any time ‘within 30 days from notice that the lands involved have been released from such withdrawal and made subject to entry.’

Thereafter, under the provisions of these regulations, defendant contested the entry of plaintiff in May, 1908. The decision of the local land officers was adverse to plaintiff and on appeal was sustained by the department, and the entry of plaintiff was cancelled April 19th, 1909. On May 18th, 1910, pursuant to order of restoration of January 10th, 1910, the land was released from every form of reclamation withdrawal and restored to entry.

Thereafter, on May 18th, 1910, plaintiff and defendant filed applications for the entry of such land. Because of matters not necessary to be detailed here, decision on such applications was withheld until June, 1912, at which time plaintiff's application was rejected and defendant's application, because of the preferential right inuring to him in virtue of his successful contest, was accepted. Upon appeal this was sustained. A rather succinct statement of the facts in the controversy will be found in *Edwards v. Bodkin*, 42 L. D. 172, 174.

Plaintiff also alleges the initiation and pendency of certain ejectment proceedings in the Superior Court of Riverside county, the county in which the land was situate, resulting adversely to him, in consequence of which he was ejected from the land.

It is also alleged, beginning with paragraph 51 of the complaint, that defendant, claiming other land by homestead, relinquished his homestead entry on the land in question in 1914 and thereupon offered scrip locations on the same land and asked for acceptance of the same. Plaintiff then alleges 'that, exercising his lawful privilege of protest, plaintiff duly filed with the Registrar and Receiver his written protest, under oath, against the allowance of said scrip locations, on or about April 1st, 1914.' Subsequently the scrip locations of the defendant were accepted by the department and patents of the United States in response thereto were issued. Wherefore plaintiff asks that the defendant be declared a trustee of said property, holding said patents for his use and benefit, etc.



### Memorandum Opinion.

Bledsoe, district judge: In this case plaintiff, who appears in *propria persona*, has imposed considerable labor upon the court because of the undue prolixity with which he has clothed both his complaint and his argument in support thereof. However, the court has endeavored, as best it might, to give all of the matters submitted to it the very careful consideration which their importance, to the parties, at least, demand.

Without going into a lengthy statement either of facts or conclusions, because of pressure of other duties, it will suffice to say that plaintiff presents, as I see it, two reasons why defendant should be declared to be a trustee for him of the land heretofore patented by the United States. First, that the Department of the Interior, without right and contrary to law, extended the so-called preference right of defendant, earned after successful termination of contest, beyond the thirty-day period provided by the statute (21 Stat. at L. 140), so as to entitle defendant to have and take advantage of such preferential right after a restoration from withdrawal of the lands affected; and secondly, that in spite of the protest of plaintiff, upon relinquishment and location by scrip of the lands in controversy, the land department fraudulently and without right overruled plaintiff's claims and allowed the aforesaid scrip location of the defendant.

It is Hornbook law that in a case of this sort the function of the court is not to sit in judgment as a court of appeal upon the conduct or conclusions of the Department of the Interior respecting a disposal of

public lands. Its jurisdiction is limited to a correction of errors such as is peculiarly the province of a court of equity where fraud has supervened, or to correct what may be shown to the court to be a manifest misconstruction of the law by the officers of the department. Within the domain of fact, in the absence of extrinsic fraud, the conclusions of the department are not susceptible to collateral attack. So, also, 'where fraud and misrepresentation are relied upon as grounds of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily affect the action of the officers in the department. Mere general allegations of fraud and misrepresentations will not suffice. (Quinby v. Conlan, 104 U. S. 420.)

The allegations of plaintiff with respect to fraud perpetrated upon him and the alleged unlawful overruling of his protest of the allowance of the scrip location, are not made with such particularity of detail as to show either that any fraud was actually committed or that any mistake of law in the overruling of plaintiff's protest was indulged in. *Non constat* no ground may have been set up in plaintiff's protest against the allowance of the scrip location sufficient to authorize or justify the department in sustaining it. Assuredly no particulars of fraudulent conduct are alleged and nothing but the most general and inconclusive assertions with respect to fraud are indulged in.

The main question in the case centers around the right of the Department of the Interior to allow the preferential right inuring to the successful contestant

of an entry upon public lands to attach and be taken advantage of after the lands have been restored to entry subsequent to a 'first form' withdrawal under the Act of June 17th, 1902 (32 Stat. at L. 388). The department in several apparently well considered decisions has held that such right obtains (*Fairchild v. Eby*, 37 L. D. 362; *Beach v. Hansen*, 40 L. D. 607; *Wright v. Francis*, 26 L. D. 499; *Edwards v. Bodkin*, 42 L. D. 172), and this court is not prepared to hold that there is such a manifest disregard of the law exhibited by those holdings as to warrant interference in plaintiff's behalf.

It must be conceded that the statute of 1880 gave to a successful contestant a substantial statutory right—the right to enter the land which was the subject of the successful contest. In order that evasions of the law might be prevented and frauds upon the government avoided it was both necessary and proper that this statutory right and privilege should be given due recognition and that it should be accorded a liberal construction in the administration of the land laws. It was intended to act as a preventive of frauds upon the government and intended to reward those who were diligent in exhibiting the facts of such fraud to the government. It may have been that, with respect at least to 'first form' withdrawals, the Department of the Interior should never have permitted contests. However, at the time of the contest in question, there is no doubt but that under the instructions governing the conduct of that department such contests were allowed. With the wisdom or policy of permitting such contests,

of course, this court has no concern. In the event of the successful termination of such contest, under the Statute of 1880 the contestant, as above referred to, was entitled to a preferential right of entry. This right must needs have been made use of by him within thirty days after notice of the successful termination of his contest. A withdrawal of the lands involved in a contest under the 'first form' of the Reclamation Act, however, served to exclude such land so withdrawn from entry. In contemplation of law it had then, temporarily or permanently, been taken over for public and governmental purposes. In the event of its being taken over permanently, that is, in the event of the completion of the reclamation project as originally conceived and the actual use of the land for the public purpose contemplated in the original withdrawal, the contestant would, of course, have lost his preferential or any other right of entry; but it must be assumed that he instituted his contest with such possibility in mind. In the event, however, that it should be discovered, as it was in this case, that the withdrawal was unnecessary,—that the original intention to use the withdrawn lands could not for some reason be consummated,—and the land should thereafter be restored to the public domain, subsequent entry, as between the contestant who had a preferential right and the entryman whose claims to the land had, after due investigation, been denied, should be given to the one who had done everything in his power, presumably, to comply with the laws of the United States, rather than to one who, presumably, under the findings and



judgment of the Interior Department, had failed to comply with such laws.

In other words, having initiated a contest and having proven to the satisfaction of those given jurisdiction to hear it that his contest was well founded, the contestant, under the statute, had a right to enter the land as for himself. This right he must exercise within thirty days after notice of a decision in his favor. This right, however, though a substantial one, was denied to him because of the withdrawal of the land by superior authority—the government of the United States. Upon the land reverting to the public domain and upon its thereafter becoming subject to entry, there would seem to be good reason for holding that the preferential right theretofore awarded by statute to the contestant should then inure to him. At all times after a determination of his contest in his favor, presumably, he was ready, willing and anxious to make his entry. He was prevented from so doing by the action of the government. There can be no impropriety, then, in according to him a substantial recognition of this right as soon as it had been definitely determined that the government no longer had claims upon the land. In my judgment the action of the department in holding that the right accrued as of the date of restoration of the land to the public domain was a correct application of the law in the premises.

Many facts are alleged by plaintiff tending to show that he was unjustly 'contested' out of his land. Obviously, with these matters, this court has nothing to do. A tribunal has been set up by the government,

competent and efficient, to determine these controversies. This court must, as it does, assume that the determinations of such tribunal are proper and supported by sufficiently persuasive and controlling facts.

The motion to dismiss on the ground that the complaint does not state a cause of action is granted.

April 16th, 1917."

In addition to the reasoning set out in the opinion of the Honorable District Court hereinbefore quoted, as appears from plaintiff's amended complaint, he appealed to the highest authority to whom was committed the authority to determine the right to the land. There is no allegation that he did not have his day in court in each of these departments provided by the government for the determination of the issue. The attack of appellant seems to be on the regulations of the Land Department, which, as we shall hereafter show, were made under the authority of an Act of Congress; and it is well settled that such regulations under authority of Congress have in the proper sense the force of law.

U. S. v. Eaton, 144 U. S. 677;

Com. v. Crane, 158 Mass. 219;

Smith v. Shakopee, 103 Fed. R. 241.

We therefore submit the appellee's points on the merits of the amended bill briefly under four heads with the citations of authorities in support of the propositions.

I. A decision rendered by the officers of the Land Department upon questions of fact, or mixed questions

of law and fact, is conclusive and not subject to be reviewed by the courts except by clear showing of fraud, or the entire lack of evidence.

Ross v. Day, 232 U. S. 110;

Whitcomb v. White, 214 U. S. 15;

Shepley v. Cowan, 91 U. S. 330;

Quinby v. Conlan, 104 U. S. 420;

Burfening v. Ry. Co., 163 U. S. 321;

Marquez v. Frisbie, 101 U. S. 473 (this case is particularly in point where there is a mixed question of law and fact);

King v. McAndrews *et al.*, 111 Fed. 860 (this case is especially strong in its reasoning, and the citation of many authorities, and is an opinion of the Circuit Court of Appeals, the 8th Circuit).

The case of Emmons v. U. S., 175 Fed. 514, is a very decisive opinion by Judge Wolverton while sitting in the Circuit Court of the District of Oregon.

In the case of Quinby v. Conlan, 104 U. S. 420, Judge Field, speaking for the court, said:

“And where fraud and misrepresentations are relied upon as grounds of interference by the court they should be stated with such fulness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice. United States v. Atherton, 102 U. S. 372.”

In the case at bar the allegations of fraud are too general. They amount to nothing in the way they are

attempted to be plead. The amended bill of complaint is an attack upon the high officers of one branch of the government, and the allegations, within all of the decisions mentioned, are not sufficient.

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2. The government had authority to allow the appellee to exercise his preferential right within thirty days after notice that the land was restored to entry.

Under this proposition we call attention to the fact that where a period of time is fixed by statute or a court for the performance of any act, and the government or state whose statute is relied on, or the court whose rule is referred to, places some obstacle in the way which prevents the performance of the act within the time prescribed, then the time is extended over the period of the obstacle. This was the rule at common law, and most states have a statute upon the subject. As it appears, after the defendant had justly earned his preference right by a long series of contests, the government, of its own accord, and exercising its superior right in such matters, withdrew the land from settlement, during which time the appellant was not permitted to exercise the right given him by the Act of May 4, 1880 (21 Stat. 140).

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3. Where an executive department of the government exercises certain powers and renders certain decisions for a certain period of years, Congress having power to legislate on the subject, is held to have acquiesced in the action of the executive department.

U. S. v. Midwest Oil Co., 236 U. S. 459.



Therefore, we call attention to a long list of decisions of the land department which sustain the right of the Land Department in the case at bar to permit appellee to file on the land after the expiration of the thirty days provided for by the Act of 1880, *supra*, and when it was impossible for the appellee to make settlement by reason of an act of the government in withdrawing the land.

Fairchild v. Eby, 37 Land Dec. 362;  
Wright v. Francis *et al.*, 36 Land Dec. 499;  
Beach v. Hansen, 40 Land Dec. 607;  
Wells v. Bodkin, 42 Land Dec. 340;  
Edwards v. Bodkin, 42 Land Dec. 172;  
*Re* Joseph F. Gladeux, 41 Land Dec. 286.

We call particular attention to the regulations of the Land Department found in 42 Land Dec., commencing at page 365. These regulations, as shown by section (1) thereof, were promulgated under the authority of the "Reclamation Act" of June 17, 1902; and section 26 of these regulations, found on page 370 of Vol. 42, Land Decisions, provides for just such cases as the case at bar, that is, the successful contestant might exercise his right within thirty days from notice that the lands had been restored to public domain. This is exactly what the appellee did in the case at bar.

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4. As an absolute authority sustaining the action of the Land Department we call special attention to the Act of Congress of June 17, 1902, hereinbefore referred to, known as the "Reclamation Act," particularly

section (3) of said Act (32 Stat. 388), and also section (10) of said Act, which expressly authorizes the Secretary of the Interior to make such rules and regulations as shall be necessary and proper for the purpose of carrying the Act into full force and effect.

The order of the Secretary of the Interior withdrawing, under this "Reclamation Act," the lands in this controversy, was issued September 12, 1903; and thereafter, on June 6, 1905, the Secretary of the Interior, in pursuance of the power given him by section (10) of the "Reclamation Act," promulgated the following rules:

"Sixth. Any entry embracing lands included within any withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and cancelled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest, will be awarded a preferred right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form.

"Seventh: When any entry for lands embraced within a withdrawal under the first form is cancelled by reason of contest or for any other reason, such land becomes subject immediately to such withdrawal and cannot thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may

exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

Finally, and we might say as a fifth proposition, it may be said that where the government, under an Act of Congress and the rules and regulations of the Land Department, had granted to the appellee a valuable right which he had acquired by the expenditure of time and money over a series of years in winning his contest, and conceding that the government's right in public land is superior, no one could deprive the appellee of this right. There is authority for this position found in the case of *James et al. v. Germania Iron Co.*, 107 Fed. 602, an opinion by Judge Sanborn of the Circuit Court of Appeals, citing authorities.

It is very respectfully submitted that there is no merit whatever in the plaintiff's amended complaint, and it is therefore respectfully submitted that if this Honorable Court should see fit to consider the merits of the amended bill, that the judgment of the Honorable District Court in sustaining the demurrer should be sustained.

DUKE STONE,

*Attorney for Appellee.*













